

United States
Circuit Court of Appeals

For the Ninth Circuit.

F. M. O'CONNOR, STELLA M. O'CONNOR, W.
H. MORRISON and R. J. MIEDEL,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED

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No. 11142

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Northern Division of the United States District Court for the Northern District of California

Civil No. 4158R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40.34 ACRES OF LAND IN THE COUNTIES OF PLACER AND EL DORADO, STATE OF CALIFORNIA, CENTRAL PACIFIC RAILWAY COMPANY, a Corporation. SOUTHERN PACIFIC LAND COMPANY, a Corporation; GRACE B. MAITHER, GRACE B. MAITHER, as Administratrix of the Estate of A. F. Maither, Deceased; MARGARET V. McDONALD, MARY E. FOWLER, JAMES G. MAITHER, THE EL DORADO AND PLACER COUNTIES GOLD MINING & POWER COMPANY, a Corporation; D. B. RICHARDS, as Trustee; CHARLES BONE, HEDWIG B. ENGLE, W. J. GIRARD, CARL VON DER MEHDEN, A. B. WHEELER, F. M. DUNN, W. D. PENNYCOCK, W. D. STEVENS, B. J. CORRIGAN, GEORGIA MAITHER, ADA L. THRELKELD, F. M. O'CONNOR, STELLA O'CONNOR, R. J. MIEDEL, R. B. SOMERBY, W. H. MORRISON, W. F. FISHER, AMERICAN RIVER GOLD MINING COMPANY, a Corporation; FRED I.

GREEN, also known as F. I. GREEN; M. L. CUMMINGS, H. A. McKINSTRY, J. A. WARE, F. J. FOSTER, J. G. MAITHER, SUSIE M. MAITHER, GEORGE Z. JOHNSON, JOHN W. KILLINGER, C. W. FLETCHER, JACK WARD, IRENE GANNETT, [1*] JOHN DOE ONE, JOHN DOE TWO, JOHN DOE THREE, JOHN DOE FOUR, JOHN DOE FIVE, JOHN DOE SIX, JOHN DOE SEVEN, JOHN DOE EIGHT, JOHN DOE NINE, JOHN DOE TEN; JANE DOE ONE, JANE DOE TWO, JANE DOE THREE, JANE DOE FOUR, JANE DOE FIVE, SAM BLACK CORPORATION ONE, SAM BLACK CORPORATION TWO, SAM BLACK CORPORATION THREE, SAM BLACK CORPORATION FOUR, SAM BLACK CORPORATION FIVE. All persons in occupancy of or having or claiming any interest in any of the property described in this complaint, or in the just compensation to be determined for the taking thereof, and also unknown owners, claimants, representatives, successors and assigns of said defendants,

Defendants.

COMPLAINT FOR CONDEMNATION

To the Honorable Judges of the District Court of the United States, in and for the Northern District of California.

*Page numbering appearing at foot of page of original certified Transcript of Record.

Comes now the United States of America, the plaintiff in the above-entitled cause, by Frank J. Hennessy, United States Attorney for the Northern District of California, and G. B. Hjelm, Assistant United States Attorney for said District, as attorneys on behalf of the United States of America, as plaintiff herein, on application of the Secretary of War of the United States, and under direction of, and by authority of the Attorney General of the United States, and complains and alleges:

I.

That said plaintiff during all the times herein mentioned was and is a sovereign empowered and authorized to acquire by purchase, or by the exercise of the power of eminent domain, any real estate, or any interest therein, wherever situate within its jurisdiction, necessary for any public use of the plaintiff.

II.

That this is a suit of a civil nature brought by said plaintiff under the authority of and pursuant to the provisions of an Act of Congress approved April 24, 1888 (25 Stat. 94, Section 591, Title 33 U. S. Code), and an Act of Congress approved August 30, 1935 (Public No. 409—74th Congress, H. R. 6732) entitled “An Act Authorizing the Construction, Repair and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes,” and “Rivers and Harbors Committee Document Numbered 50, Seventy-Fourth Congress,” authorizing the acquisition by the United States

of America by purchase and condemnation of any estate, right, title and/or interest in and to the real property hereinafter described. [3]

III.

That said Acts of Congress set forth in the paragraph last aforesaid, together with said Rivers and Harbors Committee Document No. 50, authorize the Secretary of War to acquire by purchase and condemnation any estate, right, title and/or interest in and to the real property hereinafter described not now held, owned, and/or possessed by the United States of America for the purpose of for a period of two years from and after the time of the granting and entry of an Order by this Court granting to the United States of America immediate possession of said land, removing concrete aggregates therefrom and from out the same and for the purpose of exercising such other rights therein and thereto as may be incidental to the construction of the Ruck-a-Chucky Dam and Reservoir on the Middle Fork of the American River, in the Northern Division of the Northern District of California, all of which is in furtherance of the construction and maintenance of the Ruck-a-Chucky Dam and Reservoir on the Middle Fork of the American River in the Northern Division of the Northern District of California, which said Ruck-a-Chucky Dam and Reservoir is a project, among others, of preventing the flow of debris resulting from hydraulic mining in and upon and natural erosion which may accumulate from, the watershed of the said Middle Fork

of the American River, at and above, the place on said river where said Ruck-a-Chucky Dam and Reservoir is being constructed, down the course of said river and thence down the American River into the Sacramento River, and preventing such debris and accumulations from such erosion from obstructing, impeding and interfering with navigation in the navigable portions of the said rivers.

IV.

That in the prosecution of the project for the control of debris in the Sacramento River and its tributaries in the State of California, authorized by the River and Harbor Act [4] of August 30, 1935, the Secretary of War is preparing to construct the Ruck-a-Chucky Dam and Reservoir on the said Middle Fork of the American River, and for the purpose of carrying out said project of constructing said Ruck-a-Chucky Dam and Reservoir, the Secretary of War has selected for acquisition by the United States of America a right of uninterrupted use and occupancy of the land hereinafter described, for a period of two years from and after the time of the granting and entry of an order by this Court granting to the United States of America immediate possession of said land, for the purpose of, during said period of two years, removing concrete aggregates such as sand and gravel and other materials commonly known as concrete aggregates therefrom and from out said land in such quantity and quantities and in such manner as may be found to be expedient and

proper in the carrying out of said project, and for the purpose of exercising such other rights therein and thereto during said period of two years as may be incidental to the construction and maintenance of said Ruck-a-Chucky Dam and Reservoir, and that in the process of removing said concrete aggregates from and out of said land for the purposes and as aforesaid provision for recovery of the gold contents of such material be made, upon terms, conditions, and in manner as follows:

The sand and gravel plant to be constructed by the United States of America so as to permit the installation of gold recovery devices requiring a vertical drop of not more than 20 feet for materials which will pass a standard $\frac{1}{4}$ " screen and a vertical drop of not more than 8 feet for material which is retained on a standard $\frac{1}{4}$ " screen but passes a standard 1" screen, said gold recovery devices to be furnished, installed, and operated by the owner, and, except as specifically indicated below, without cost to the United States of America. [5]

(A) All material will pass a standard 1" screen to be segregated by the United States of America into two sizes and delivered to the gold recovery devices by force of gravity from screen or trommel in such a manner that no material amount of gold is lost before delivery. Separate sizes to be delivered to the top of the gold recovery devices are as follows:

(a) All material which will pass a standard $\frac{1}{4}$ " screen;

(b) All material which is retained on a standard $\frac{1}{4}$ " screen but passes a standard 1" screen.

(B) Sufficient water to be delivered by the United States of America to the top of the gold recovery devices for their efficient operations, such amount not to exceed 2,100 gallons per minute.

(C) Sufficient electrical energy to be delivered by the United States of America to the gold recovery devices for their efficient operation, such amount not to exceed 20 horsepower of connected load.

(D) Material returned from the gold recovery devices to be removed by the United States of America at such a rate as will prevent clogging or backing up to such an extent as would interfere with the operation of the gold recovery devices.

(E) All machinery, plant, buildings, etc., to be removed by the United States of America from said property within 120 days after acceptance from the contractor of the completed dam by the United States of America.

(F) Any and all roads on the property which are used in the construction of the Ruck-a-Chucky Dam to be returned to the above mentioned owner at the expiration of the easement in as good condition as when the Government's operation began.

The above provisions to be subject to the owner conforming to the following stipulations:

(1) The owner to operate the gold recovery devices in such a manner and at a rate that the prime purpose of the sand and gravel plant, i.e., the production of cleaned, well-graded sand and gravel, will not be retarded.

(2) If the owner elects to exercise his privilege of extracting the gold and other precious metals from the materials disturbed by the United States, he is to furnish, install, and operate gold recovery devices which will require vertical clearances as follows:

(a) A vertical drop of not more than 20 feet for material which will pass a standard $\frac{1}{4}$ " screen. [6]

(b) A vertical drop of not more than 8 feet for material which is retained on a standard $\frac{1}{4}$ " screen, but passes a standard 1" screen.

(3) The owner to return all material, after the removal of gold and other precious minerals therefrom by force of gravity, at the same rate and of the same consistency as delivered to the gold recovery devices, with a loss of not more than 5 per cent.

That in the event said owners, R. J. Miedel, F. A. O'Connor and Stella O'Connor, shall fail or refuse to carry out the requirements last above set forth, at the time required by the Chief of Engineers, United States Department of War, then and in that event the plaintiff shall have the option to either take the said concrete aggregates without recovery

of gold contents thereof, if any there be, or to carry out the requirements so failed or refused by the said defendants, which said land consisting of 40.34 acres, more or less, is situate in the County of Placer and the County of El Dorado, State of California, and is more particularly described as follows, to-wit:

All that certain real property situate, lying and being in the Counties of Placer and El Dorado, State of California, more particularly described as follows:

The $E\frac{1}{2}$ of the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of Section 23, Township 13 North, Range 9 East, Mount Diablo Base and Meridian, delineated and bounded as follows:

Beginning at a point marking the southeast corner of the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 23, T. 13 N. R. 9 E., M.D.B.&M., said Point bearing S. $89^{\circ} 55'$ W. and distant 1,345 feet, more or less, from the corner common to Sections 23, 24, 25 and 26, T. 13 N., R. 9 E., M.D.B. & M., and running thence along the line between Sections 23 and 26 of the aforesaid township and range, S. $89^{\circ} 55'$ W., 672.8 feet, more or less, to the southwest corner of the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23, thence along the north and south line on the west side of the $E\frac{1}{2}$ of the $W\frac{1}{2}$ of $SE\frac{1}{4}$ of said Section 23, N. $2^{\circ} 14'$ W., 2,667.2 feet, more or less, to the northwest corner of the $NE\frac{1}{4}$ of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23, [7] thence along the east and west one-half section line of said Section 23, N. $89^{\circ} 10'$ E., 643.3 feet, more or

less, to the northeast corner of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Section 23; thence along the north and south line on the east side of the E $\frac{1}{2}$ of the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ of said Section 23, S. 2° 52' E., 2,677.0 feet, more or less, to the point of beginning, and containing 40.34 acres, more or less.

All of the above bearings are referred to the true north meridian.

That a map or plat showing the land above described with the river and lands adjacent thereto, is hereto annexed, marked Exhibit "A" and made a part hereof.

V.

That the estate or interest in and to the said land described in paragraph IV of this complaint, which the plaintiff intends to seek, take, acquire, condemn, hold and own by these proceedings, is a right, power, and privilege of uninterrupted use and occupancy of the said land described in said paragraph IV, for a period of two years from and after the time of the granting and entry of an order by this Court, granting to the United States of America immediate possession of said land for the purposes of, and with the right, power, and privilege of, during said period of two years, taking and removing concrete aggregates such as sand and gravel and other materials commonly known as concrete aggregates therefrom and from out said land in such quantity and quantities and in such manner as may be found by the plaintiff expedient, necessary and proper in the carrying out of the construction of said Rucka-Chucky Dam and Reservoir project, and with the

right and for the purpose of exercising such other rights in and to said land, during said period of two years, as may be incidental to the construction of said Ruck-a-Chucky Dam and Reservoir, and that in the process of the removal of said materials from and out of said land for purposes and uses as aforesaid, [8] provision for recovery of the gold contents of such material to be made, upon terms, conditions, and in manner as set forth in paragraph IV of this complaint commencing at line 25, page 4, and ending at the word "defendants" in line 15, page 4b; such right, power, and privilege of use and occupancy of said land and the removal of concrete aggregates from and out of said land to be uninterrupted during said period of two years, free from any right or claim of any defendants herein to at all interfere with or interrupt such use and occupancy by the United States of America, and all thereof for the purposes aforesaid.

VI.

That adequate funds are available for paying any and all awards that may be granted herein to any of said above named defendants or to anyone having any interest in and to said land, from an appropriation for maintenance and improvements of existing works for Rivers and Harbors, Act approved July 19, 1937. [9]

VII.

That in the opinion of the Secretary of War and the Chief of Engineers of the War Department,

it is necessary, advantageous and in the interests of the United States that the right of use and occupancy described in paragraph V hereof in and to said land described in paragraph IV hereof be acquired by judicial proceedings for the use aforesaid, and the Secretary of War has so determined and has approved of such acquisition.

VIII.

That the Secretary of War of the United States, pursuant to the provisions of the foregoing Acts of Congress, has endeavored to acquire said quantum of estate as set forth in paragraph V hereof for the purposes aforesaid, in and to said land described in paragraph IV hereof, but has been unable to acquire the same up to this time at prices and upon conditions and terms deemed by him to be reasonable, and therefore has determined, and is of the opinion, that it is necessary, advantageous and in the interests of the United States that said quantum of estate be acquired by judicial proceedings, and has made application to the Attorney General of the United States to institute such proceedings, and the Attorney General of the United States, in pursuance of said application, has directed the United States Attorney for the Northern District of California to institute these condemnation proceedings.

IX.

That pursuant to an Act of Congress approved July 18, 1918 (40 Stat. 911 C. 155, Sect. 5; Section 594, Title 33, U. S. Code), the plaintiff, upon the

filing of the complaint in this proceeding, becomes entitled to the right to take immediate possession of said land, the portion of said Act relating to immediate possession being in the words and figures following: [10] “Whenever the Secretary of War, in pursuance of authority conferred on him by law, causes proceedings to be instituted in the name of the United States for the acquirement by condemnation of any lands, easements, or rights of way needed for a work of river and harbor improvements duly authorized by Congress, the United States, upon the filing of the petition in any such proceedings, shall have the right to take immediate possession of said lands, easements, or rights of way, to the extent of the interest to be acquired, and proceed with such public works thereon as have been authorized by Congress; Provided, that certain and adequate provision shall have been made for the payment of just compensation to the party or parties entitled thereto, either by previous appropriation by the United States or by the deposit of moneys or other form of security in such amount and form as shall be approved by the court in which such proceedings shall be instituted. The respondent or respondents may move at any time in the court to increase or change the amounts or securities, and the court shall make such order as shall be just in the premises and as shall adequately protect the respondents. In every case the proceedings in condemnation shall be diligently prosecuted on the part of the United States

in order that such compensation may be promptly ascertained and paid.”

X.

That the Secretary of War of the United States, pursuant to the provisions of Section 5 of the said River and Harbor Act of July 18, 1918, has determined and is of the opinion that it is necessary, advantageous and in the interests of the United States that an order be obtained from this Court authorizing the said Department to take immediate possession of the said land, and the said United States Attorney has been authorized and directed by the Attorney General of the United States to take proper proceedings herein to secure such order from the above named Honorable Court.

XI.

That said public use and improvement proposed herein to be made by the United States of America is planned and located in the manner which will be most compatible with the greatest public good and the least private injury. [11]

XII.

That all preliminary steps required by law have been taken to entitle plaintiff to institute these proceedings.

XIII.

That the purposes for which plaintiff is taking said quantum of estate in and to said land are necessary and constitute a public use, and that the

use to which said property is to be applied is a use authorized by law.

XIV.

That so far as the plaintiff has been able to ascertain the lands hereinbefore described are not devoted to public use.

XV.

That the title and the fee in and to said land described in paragraph IV hereof is vested in the United States of America and is subject only to alleged outstanding mineral rights claimed by said defendants;

XVI.

That the above named defendants, and each of them, claim to have, own or hold some ownership, right, title, estate, interest, claim, demand or lien in, to or upon said property hereinbefore described, and that the names of all the owners and claimants of any interest, right or claim in and to the said land so far as is known to the plaintiff, are set forth in the title of this action.

XVII.

That there may be persons unknown who may have some right, title, estate, interest, claim, demand or lien in, to, or upon said property hereinbefore described and for that reason all unknown owners, claimants, lienors and lessees having or claiming to have any right, title, estate, interest, claim, demand or lien, and all occupants and users and holders and owners of, and claimants to easements in, upon, over, across [12] or through the

lands hereinbefore described, and all unknown assignees and successors of the parties named herein are made parties defendant to this complaint.

XVIII.

That the defendants, John Doe One, John Doe Two, John Doe Three, John Doe Four, John Doe Five, John Doe Six, John Doe Seven, John Doe Eight, John Doe Nine, John Doe Ten, Jane Doe One, Jane Doe Two, Jane Doe Three, Jane Doe Four, Jane Doe Five, Sam Black Corporation One, Sam Black Corporation Two, Sam Black Corporation Three and Sam Black Corporation Four and Sam Black Corporation Five, are sued and designated herein by fictitious names for the reason that their true names are unknown to the plaintiff, but that plaintiff will, upon ascertaining their true names, substitute the same for such fictitious names by proper amendments; that said defendants, and each of them, have, or claim to have, an interest in said land described in paragraph IV of this complaint, but that the nature, character or extent of such interest is unknown to the plaintiff.

XIX.

The plaintiff further alleges that the Congress of the United States by the Act entitled "Making Appropriations for the Fiscal Year Ending June 30, 1938, for Civil Functions administered by the War Department, and for Other Purposes," approved July 19, 1937 (Public No. 208—75th Congress, H. R. 7493) has appropriated funds for the

acquisition of the right to use and occupancy of the land hereinbefore described and sought herein to be taken, and the appurtenances thereto, and that there are sufficient funds now available for the payment of just and reasonable compensation therefor in whatever sum this Court may adjudge constitutes such just and reasonable compensation, and sufficient funds are available for the development and future control of said Ruck-a-Chucky Dam and Reservoir Project. [13]

XX.

That the public use, interest, convenience and necessity require that the said quantum of estate in said land hereinbefore described, together with the appurtenances thereto, be appropriated to the extent and for the purposes as aforesaid, acquired and taken for the purposes hereinbefore set forth, and as set forth in said Document No. 50, and the recommendation of the Chief of Engineers therein contained, that this Honorable Court inquire into, determine and adjudge any and all ownerships, interest, titles, estates, demands or liens of said defendants, and each of them, in, to, or upon said land, or any part thereof.

XXI.

That none of the property herein described has heretofore been appropriated for public use.

XXII.

That the defendant, Central Pacific Railway Company, a corporation, is a corporation duly or-

ganized and existing under and by virtue of the laws of the State of Utah, and duly authorized to own property and transact business in the State of California.

That said defendant, Central Pacific Railway Company, a corporation, claims some right, title and interest, other than the fee, in and to the land described in paragraph IV of this complaint, the particular nature whereof is to plaintiff unknown, except that certain records in the office of the County Recorder in and for the County of Placer, State of California, disclose that under date of October 10, 1904, said defendant corporation filed an action against one Grace B. Maither, Administratrix of the Estate of A. F. Maither, deceased, to cancel an alleged contract of sale between it and the said A. F. Maither, which contract bears date of November 18, 1901; that in said action a judgment was made [14] and entered in favor of said defendant corporation on November 9, 1904; that other than as aforesaid the plaintiff has no information as to the claim of said defendant, Central Pacific Railway Company, a corporation, and leaves it to said last named corporation to appear herein and assert its claim, if any it has.

XXIII.

That said defendant, Southern Pacific Land Company, a corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of California.

That said defendant, Southern Pacific Land Company, a corporation, claims some right, title or in-

terest in and to said land described in paragraph IV of this complaint, other than the fee therein and thereto, and that such claim is based upon some assignment of interest from said defendant, Central Pacific Railway Company, a corporation, the nature of which is to plaintiff unknown, and plaintiff leaves it to said defendant corporation to appear herein and assert its claim, if any it has.

XXIV.

That said defendant, Grace B. Maither, individually and said defendant Grace B. Maither, as Administratrix of the Estate of A. F. Maither, deceased, may claim some right, title or interest in and to the land described in paragraph IV of this complaint other than the fee therein and thereto, the nature and extent of which claim is to plaintiff unknown and plaintiff leaves it to said defendant to in her individual capacity and as Administratrix as aforesaid, appear and assert such claim as she may have, if any.

Plaintiff alleges that said defendant has no valid claim in and to the said real property, and if she ever did have such claim the same is now null and void. [15]

XXV.

That said defendants, Margaret V. McDonald, Mary E. Fowler, and James G. Maither, appear by the records in the office of the County Recorder in and for said County of Placer, to have acquired by deed from one Martha Huffman dated December 21, 1912, and recorded September 25, 1913 in Book

144 of Deeds, at page 394, said Placer County Records, title to what is designated in said deed of conveyance as "Mile Hill Water Right" in and to said Section 23 referred to in paragraph IV of this complaint.

That plaintiff is not informed of the nature and the extent of such "Mile High Water Right" in so far as the same may affect the land described in paragraph IV of this complaint and therefore leaves it to said defendants to appear herein and assert such rights, claim or claims, if any, they have.

XXVI.

That said defendant, The El Dorado and Placer Counties Gold Mining & Power Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Arizona, and until March 1, 1919 was duly authorized to transact business and acquire interest in land in the State of California; that on said March 1, 1919, the said corporation forfeited its California franchise and has not to the date of the commencement of this action had its franchise restored.

That under date of September 4, 1907, said corporation executed a deed of trust to said defendant D. B. Richards, as trustee, in which deed of Trust the said defendants Charles Bone, Hedwig B. Engle, W. J. Girard, Carl Von Der Mehden, A. B. Wheeler, F. M. Dunn, W. D. Pennycock and W. D. Stevens, are named as beneficiaries, which deed of trust was recorded on September 7, 1917, in Book 167 of Deeds, at page 239, in [16] the office of the

County Recorder in and for the said County of Placer, which deed of trust, among other property, covers the "Middle Ford Placer Mining Claim" in the SE $\frac{1}{4}$ of said section 23, and also all the right, title and interest of said corporation in and to the "Georgia Lee Placer Mining Claim;" that said property covered by said deed of trust was sold under the terms of the said deed of trust because of a default, and a trustee's deed was issued to said defendant B. J. Corrigan; that the said trustee's deed did not include the "Georgia Lee Placer Mining Claim;" that the said "Georgia Lee Placer Mining Claim" was purported to have been located on March 31, 1913, by Andrew Schlappi, Andrew Hoffman, said defendant Georgia Maither and said defendant Ada L. Threlkeld; that the said Andrew Schlappi and the said Andrew Hoffman thereafter conveyed their purported interests as aforesaid to said defendants Georgia Maither, and Ada L. Threlkeld.

That plaintiff is not informed as to the nature and extent of the claim or claims of said defendants, The El Dorado and Placer Counties Gold Mining & Power Company, a corporation, D. B. Richards, as trustee, Charles Bone, Hedwig B. Engle, W. J. Girard, Carl Von Mehden, A. B. Wheeler, F. M. Dunn, W. D. Pennycock, W. D. Stevens, B. J. Corrigan, Georgia Maither and Ada L. Threlkeld, and leaves it to said defendants, and each of them, to appear herein and assert whatever claim or claims they or each of them may have in and to said real property described in paragraph IV hereof, other

than the fee therein and thereto which is vested in the United States of America.

XXVII.

That the said defendant American River Gold Mining Company, a corporation, is a corporation organized and existing [17] under and by virtue of the laws of the State of California.

That the said defendants, American River Gold Mining Company, a corporation, F. J. O'Connor, Stella O'Connor, R. B. Somerby, W. H. Morrison and W. F. Fisher, claim some right, title or interest in and to the real property described in paragraph IV hereof other than the fee therein and thereto which is vested in the United States of America; that plaintiff is unable to state what, if any, rights said defendants last above named may have in and to said real property and therefore leaves it to said defendants last named to appear herein and assert any claim they or each of them may have other than the fee vested as aforesaid in the United States of America.

XXVII½.

That from information had from the Division of Investigation of the United States Department of Interior, General Land Office, Washington, D. C., it appears and plaintiff so alleges, that the defendants R. J. Miedel, F. J. O'Connor and Stella O'Connor, are the only owners of any valid mineral rights in and to the said real property described in paragraph IV hereof.

XXVIII.

That the said defendant Fred I. Green, also known as F. I. Green, claims some right, title or interest in and to the real property described in paragraph IV hereof other than [18] the fee therein and thereto which is vested in the United States of America, and under date of June 13, 1938, said defendant Fred I. Green, also known as F. I. Green, filed an action to quiet title to certain alleged mining rights and mining claims covering among other property mining claims in and to said real property described in paragraph IV hereof against said defendants, F. M. O'Connor, Stella O'Connor, R. J. Miedel, R. B. Somerby, W. H. Morrison, W. F. Fisher and American River Gold Mining Company, a corporation, and said action is presently pending in the Superior Court of the State of California in and for said County of Placer.

That plaintiff is unable to state what, if any, rights said defendants Fred I. Green, also known as F. I. Green, may have in and to any mining claims in and to said real property described in paragraph IV hereof and leaves it to said defendant to appear herein and assert any claim he may have therein or thereto other than in the fee which is vested in the United States of America.

XXIX.

That the said defendant, R. J. Miedel, claims some right or interest in and to the land described in paragraph IV hereof, other than the fee therein

and thereto by virtue of ownership of what purports to be known as the "Spanish Bar Placer Mining Claim," which claim purports to have been located by said defendants, F. M. O'Connor, Stella O'Connor, and one F. A. Crone and one D. A. Crone, under date of August 28, 1934, recorded August 29, 1934, in Book "Y" of Mining Locations, page 345, El Dorado County Records, in the office of the County Recorder in and for said County of El Dorado, and said defendant R. J. Miedel claims said "Spanish Bar Placer Mining Claim" by virtue of assignment and quitclaim deeds from said F. A. Crone and D. A. Crone. [19]

XXX.

That said defendants, Fred I. Green, also known as F. I. Green, and M. L. Cummings, claim to have relocated said "Spanish Bar Placer Mining Claim" under the name of the "Spanish Bar Association Placer Mining Claim" by notice dated September 26, 1937, in which it is claimed that the original location of "Spanish Bar Association Placer Mining Claim" as located August 28, 1934, has been abandoned and forfeited, and said relocation is recorded in the office of the County Recorder in and for the County of El Dorado, California, September 29, 1937, in Book "Z" of Mining Locations at page 320;

That plaintiff is unable to determine the extent and nature of said claim of said defendants Fred I. Green and M. L. Cummings and leaves it to said defendants to appear herein and assert any claim they or either of them may have in and to the real

property described in paragraph IV hereof, other than the fee therein and thereto which is vested in the United States of America.

XXXI.

That the said defendants, H. A. McKinsty, J. A. Ware, F. J. Foster and J. G. Maither, have filed the following mining location, to-wit, "Middle Fork Placer Mining Claim," dated February 3, 1908, recorded March 20, 1908 in Book "N," page 406, and Amended Location in Book "S," page 336, in the [20] Office of the County Recorder in and for the said County of El Dorado.

That plaintiff is unable to determine the extent and nature of said claim of said defendants last above named in and to the real property described in paragraph IV of this complaint and leaves it to said defendants, and each of them, to appear herein and assert whatever claim or claims they or each of them may have in and to said real property described in paragraph IV hereof, other than the fee therein and thereto which is vested in the United States of America.

XXXII.

That the said defendant, Susie M. Maither, filed mining claim known as "Big Bend Placer Mining Claim," dated May 21, 1917, recorded in the office of the County Recorder in and for said County of El Dorado on May 23, 1917, in Book "S," page 376.

That plaintiff is not able to determine what interest, if any, said defendant has in and to the real

property described in paragraph IV hereof and leaves it to said defendant to appear herein and assert whatever claim she may have in and to said real property described in paragraph IV hereof, other than the fee therein and thereto which is vested in the United States of America.

XXXIII.

That on March 12, 1932, the said defendants, George Z. Johnson, John W. Killinger and C. W. Fletcher made location of what is known as "Good Find Placer Mining Claim" and caused notice of such mining claim to be recorded in the office of the County Recorder in and for said County of El Dorado on March 17, 1932, in Book "X," page 323.

That plaintiff is unable to determine the nature and extent of the interest of said defendants last named in and [21] to the real property described in paragraph IV of this complaint and leaves it to said defendants, and each of them, to appear herein and assert whatever claim or claims they or each of them may have in and to said real property described in paragraph IV hereof, other than the fee therein and thereto which is vested in the United States of America.

XXXIV.

That on July 1, 1935, the said defendants, Jack Ward and Irene Gannett, filed a mining location known as "Oregon Bar Placer Mining Claim," and recorded the same in the Office of the County Recorder of El Dorado County on July 31, 1935, in Book "Z" at page 11;

That plaintiff is unable to determine the nature and extent of the claims of said defendants and each of them in and to the land described in paragraph IV of this complaint and leaves it to said defendants, and each of them, to appear herein and assert whatever claim or claims they or each of them may have in and to said real property described in paragraph IV hereof, other than the fee therein and thereto which is vested in the United States of America.

XXXV.

That none of the defendants named or referred to in the above entitled cause, other than said defendants F. M. O'Connor, Stella O'Connor and R. J. Miedel, has any valid right, title, interest, estate or valid claim in and to the land described in paragraph IV of this complaint. [22]

Wherefore, Plaintiff prays judgment:

(1) That under process of this Court, the defendants hereinbefore named, and all unknown owners of any interests or claims may have notice of said proceeding in the manner provided by law, and that they may be required to set forth the nature and extent of their several ownerships, claims, interests, titles, estates, rights or liens, if any, in, to, or upon said premises, or in, to, or upon any part thereof, and that their asserted ownerships, claims, interests, titles, estates, rights or liens, if any, may be adjudicated and forever determined and concluded thereby;

(2) That it may be adjudged by this Court that the public use to which the quantum of estate herein

sought to be condemned to the extent and for the purposes as proposed to be devoted by the plaintiff, is a public use authorized by law, and that such public use requires the condemnation of the said quantum of estate in and to the premises hereinbefore described and the whole thereof, to the extent and for the purposes in this complaint stated, and that the taking is necessary to such use;

(3) That judgment be rendered in favor of the plaintiff against the interest of each said defendant in and to the land described in paragraph IV hereof, together with the appurtenances thereto, condemning a right of uninterrupted use and occupancy of the land hereinbefore described for a period of two years from and after the time of the granting and entry of an Order of this Court granting to the United States of America immediate possession of said land for the purposes of, and with the right, power and privilege of, during said period of two years, taking and removing concrete aggregates, such as sand and gravel and other materials commonly known as concrete aggregates, therefrom [23] and from out said land in such quantity and quantities and in such manner as may be found by the plaintiff expedient, necessary and proper in the carrying out of the construction of said Ruck-a-Chucky Dam and Reservoir Project, and with the right and for the purpose of exercising such other rights in and to said land, during said period of two years, as may be incidental to the construction of said Ruck-a-Chucky Dam and Reservoir, and that in the process of removing said concrete aggre-

gates from and out of said land for the purposes and as aforesaid provision for recovery of the gold contents of such material be made, upon terms, conditions, and in manner as follows:

The sand and gravel plant to be constructed by the United States of America so as to permit the installation of gold recovery devices requiring a vertical drop of not more than 20 feet for materials which will pass a standard $\frac{1}{4}$ " screen and a vertical drop of not more than 8 feet for material which is retained on a standard $\frac{1}{4}$ " screen but passes a standard 1" screen, said gold recovery devices to be furnished, installed and operated by the owner, and, except as specifically indicated below, without cost to the United States of America.

(A) All material which will pass a standard 1" screen to be segregated by the United States of America into two sizes and delivered to the gold recovery devices by force of gravity from screen or trommel in such a manner that no material amount of gold is lost before delivery. Separate sizes to be delivered to the top of the gold recovery devices are as follows:

(a) All material which will pass a standard $\frac{1}{4}$ " screen;

(b) All material which is retained on a standard $\frac{1}{4}$ " screen but passes a standard 1" screen.

(B) Sufficient water to be delivered by the United States of America to the top of the gold recovery devices for their efficient operations, such amount not to exceed 2,100 gallons per minute.

(C) Sufficient electrical energy to be delivered by the United States of America to the gold recovery devices for their efficient operation, such amount not to exceed 20 horsepower of connected load. [24]

(D) Material returned from the gold recovery devices to be removed by the United States of America at such a rate as will prevent clogging or backing up to such an extent as would interfere with the operation of the gold recovery devices.

(E) All machinery, plant, buildings, etc., to be removed by the United States of America from said property within 120 days after acceptance from the contractor of the completed dam by the United States of America.

(F) Any and all roads on the property which are used in the construction of the Ruck-a-Chucky Dam to be returned to the above mentioned owner at the expiration of the easement in as good condition as when the Government's operation began.

The above provisions to be subject to the owner conforming to the following stipulations:

(1) The owner to operate the gold recovery devices in such a manner and at a rate that the prime purpose of the sand and gravel plant, i.e., the production of cleaned, well-graded sand and gravel, will not be retarded.

(2) If the owner elects to exercise his privilege of extracting the gold and other precious metals from the materials disturbed by the United States, he is to furnish, install and operate gold recovery

devices which will require vertical clearances as follows:

(a) A vertical drop of not more than 20 feet for material which will pass a standard $\frac{1}{4}$ " screen;

(b) A vertical drop of not more than 8 feet for material which is retained on a standard $\frac{1}{4}$ " screen, but passes a standard 1" screen.

(3) The owner to return all material, after the removal of gold and other precious minerals therefrom by force of gravity, at the same rate and of the same consistency as delivered to the gold recovery devices, with a loss of not more than 5 per cent, such right, power, and privilege of use and occupancy of said land and the removal of concrete aggregates from and out of said land to be uninterrupted during said period of two years, free from any right or claim of any defendants herein to at all interfere with or interrupt such use and occupancy by the United States of America, and all thereof for the purposes aforesaid. [25]

(4) That the Court adjudge and decree that whatever right or interest each or all of said defendants may have in and to said land be held in abeyance, and particularly each their right to the mining of said land, be held in abeyance for and during the said period of said use and occupancy of said land sought to be acquired herein shall continue, and that the Court likewise adjudge the value of any detriment suffered or to be sustained by said defendants, and each of them, by reason

of such use and occupancy by plaintiff, and such holding in abeyance of any such rights that each said defendant, or any of them, may have to mine said land as aforesaid, and that the award therefor when made and paid by plaintiff herein be adjudged and decreed to be the full and just compensation for the taking of said use and occupancy, as aforesaid;

(5) For any and all other orders, judgments or decrees that may be legal and appropriate, and especially that all persons having or claiming said land or any interest therein may be permitted and required to file appropriate pleadings to make known their claims and to pursue the fund so to be paid into Court and have all such matters adjudicated in legal and timely source between the defendants, but without further concern to the United States except to pay into Court the ascertained value of said use and occupancy in and to said land, together with the appurtenances thereto, together with said holding in abeyance of any right of said defendants to mine said land as awarded, and be thereupon vested with said right of use and occupancy for uses and purposes as set forth in paragraph V of this complaint in and to said land, together with the appurtenances thereto; [26]

(6) That such proceedings may be had herein as are required by law, that upon compliance with the requirements of the judgment entered herein and the provisions of Title VII of Part III of the Code of Civil Procedure of the State of California in that behalf contained, a final order of condemnation of said premises be made and entered herein;

(7) For such other and further relief as may be meet and proper in the premises.

FRANK J. HENNESSY,
United States Attorney

G. B. HJELM,
Assistant United States
Attorney.
Attorneys for Plaintiff. [27]

10 21 1

VERIFICATION

United States of America,
State and Northern District of California,
County of Sacramento—ss.

G. B. Hjelm, being first duly sworn, deposes and says:

That he is an Assistant United States Attorney for the Northern District of California, and one of the attorneys for the plaintiff in the within entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true;

That the reason why this verification is made by affiant and not by the plaintiff is that the plaintiff is a corporation sovereign;

That the sources of the affiant's information and the grounds for his belief are the official communications, records, files and documents received from the Attorney General of the United States and from the Secretary of War of the United States.

G. B. HJELM

Subscribed and sworn to before me this 10 day of October, 1939.

[Seal] F. M. LAMPERT

Deputy Clerk, U. S. District Court, Northern District of California

[Endorsed]: Filed Oct. 10, 1939. [29]

[Title of District Court and Cause.]

Order Granting Possession of Property in Which a Right of Use and Occupancy Is Sought to Be Condemned, and Authorizing Plaintiff to Proceed Thereon With the Public Work Authorized by Congress. [31]

Upon reading and filing the complaint in the above action, together with affidavit of L. B. Chambers, Colonel, Corps of Engineers, United States Army, and it further appearing that application has been made by plaintiff to be let into immediate possession of the lands described in the complaint herein, and hereinafter described, and to take and make use of the quantum of estate sought to be condemned as alleged in said complaint, and to proceed thereon with the public work authorized by Congress and directed by the Secretary of War and the Attorney General of the United States in the manner as set forth in said complaint; and it further appearing that certain and adequate provision has been made for payment of just compensation to the parties entitled thereto by previous appropriation of Congress of the United States for that purpose;

Now, Therefore, It Is Ordered, Adjudged and Decreed that the plaintiff be and it is hereby entitled to and shall be given immediate possession and use of the land described in the complaint herein, and hereinafter described, and plaintiff is hereby authorized to take possession of said land and to proceed with the public work thereon authorized by

Congress and directed by the Secretary of War and the Attorney General of the United States in the manner as set forth in said complaint. The United States Marshal is hereby authorized to place plaintiff in possession of said land.

Following is a particular description of the land affected by this Order.

All that certain real property situate, lying and being in the Counties of Placer and El Dorado, State of California, more particularly described as follows: [32]

The $E\frac{1}{2}$ of the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of Section 23, Township 13 North, Range 9 East, Mount Diablo Base and Meridian, delineated and bounded as follows:

Beginning at a point marking the southeast corner of the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 23, T. 13 N., R. 9 E., M.D.B. & M., said point bearing S. $89^{\circ} 55'$ W. and distant 1,345 feet, more or less, from the corner common to Sections 23, 24, 25 and 26, T. 13 N., R. 9 E., M.D.B. & M., and running thence along the line between Sections 23 and 26 of the aforesaid township and range, S. $89^{\circ} 55'$ W., 672.8 feet, more or less, to the southwest corner of the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23; thence along the north and south line on the west side of the $E\frac{1}{2}$ of the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of said Section 23, N. $2^{\circ} 14'$ W., 2,667.2 feet, more or less, to the northwest corner of the $NE\frac{1}{4}$ of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23; thence along the east and west one-half section line of said Section 23, N. $89^{\circ} 10'$ E., 643.3 feet, more or less,

to the northeast corner of the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Section 23; thence along the north and south line on the east side of the E $\frac{1}{2}$ of the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ of said Section 23, S. 2° 52' E., 2,677.0 feet, more or less, to the point of beginning, and containing 40.34 acres, more or less.

All of the above bearings are referred to the true north meridian.

The Court reserves the right hereafter to make such other and further Order herein as shall be just in the premises.

Done in open court this 10th day of October, 1939.

MARTIN I. WELSH,
Judge, U. S. District Court.

[Endorsed]: Filed Oct. 10, 1939. [33]

[Title of District Court and Cause.]

Answer of Defendants F. M. O'Connor, Stella O'Connor, his wife; R. J. Miedel, R. B. Somerby, W. H. Morrison, W. F. Fisher, Jack Ward and Irene Brinton, Sued Herein as Irene Gannett.

Comes now the defendants, F. M. O'Connor, Stella O'Connor, his wife; R. J. Miedel, R. B. Somerby, W. H. Morrison, W. F. Fisher, Jack Ward, and Irene Brinton, sued herein as Irene Gannett, and answering the complaint on file herein, admit, deny and allege:

I.

Allege that at all times herein mentioned defendants F. M. O'Connor and Stella O'Connor have been and now are husband and wife;

II.

Allege that the true name of the defendant sued and served herein as Irene Gannett, is Irene Brinton; allege that after defendant Irene Brinton acquired an interest in the real property described in the complaint she intermarried with John Brinton and that she is the person mentioned in the complaint as Irene Gannett; allege that prior to the commencement of this action defendant Irene Brinton and defendant Jack Ward sold, assigned, transferred and set over to defendants F. M. O'Connor and Stella O'Connor, his wife; R. J. Miedel, R. B. Somerby, W. H. Morrison and W. F. Fisher, the right, title and interest, if any, which the said defendants Jack Ward and Irene Brinton then had and for that reason disclaim any interest in and to the real property, or to any compensation to be paid for the use thereof; [34]

III.

Answering paragraph II, allege that they are informed and believe and therefore state that subsequent to the 30th day of August, 1936, plaintiff changed and altered its plans for the construction of a debris dam on the Middle Fork of the American River and that the public works now to be constructed and for which plaintiff now seeks to

use the real property described in the complaint is different from and no longer the same as the project originally authorized by the Act of Congress approved August 30, 1935, and referred to in said paragraph II;

IV.

Answering paragraph III, allege that they are informed and believe and therefore state that the dam which plaintiff proposes to construct is not the dam originally contemplated or authorized by Act of Congress, but is another and different dam therefrom;

Further answering said paragraph, allege that they are informed and believe and therefore state that the dam originally contemplated as set forth in paragraph III, and the dam which plaintiff now proposes to construct, will not prevent, or aid in the prevention of, the flow of any debris resulting from hydraulic mining, or natural erosion, or otherwise, which may accumulate from the watershed of the Middle Fork of the American River at or above the place on said river where it was originally contemplated and planned by plaintiff to construct a dam, or at the place where it is now contemplated by plaintiff to construct a dam, and that said dam, if built, will not prevent the flow of said debris, as aforesaid, down the course of said river into the American River, or into the Sacramento River, or prevent such or any debris or accumulations from such or any erosion from obstructing, or impeding, or interfering with navigation in the navigable portions of any river in the

State of California, or in the United States of America;

V.

Answering paragraph IV, deny that the construction of the dam set forth in the complaint is for the control of debris in the Sacramento River or any of its tributaries in the State of California, or authorized by the River and Harbor Act of August 30, [35] 1935; allege that the selection of said, or any, site, and the construction of said, or any, dam, is proposed by the Secretary of War of the United States of America, and by plaintiff, for the purpose of unlawful gain not provided by statute, in this, that plaintiff proposes to lease said dam to a miner, or miners above said dam for the purpose of storing tailings from mining operations and that said dam is not designed for and will not be used for a public purpose, but will be used solely and exclusively for private gain; admit that plaintiff proposes to use sand and gravel and other concrete aggregates now upon a portion of the real property described in the complaint; deny that said use is in any manner, or at all, for public purpose;

Further answering said paragraph IV, and referring particularly to the provisions therein set forth for the recovery of the gold content of such material as plaintiff proposes to take, these defendants allege that the specifications set forth in said paragraph are inadequate and are prejudicial to the rights of these defendants if carried into effect and that provision as set forth in said complaint should not be made for the following reasons:

a. That no rate of extraction of material is specified therein and that 2100 gallons of water per minute may, or may not, be adequate for the purpose of extracting gold from the material taken from said real property, dependent on the speed at which plaintiff proposes to remove the same, which speed is not specified in said provisions;

b. That 20 horsepower of connected load of electric energy may, or may not, be adequate for gold recovery devices, dependent upon the speed at which plaintiff proposes to remove material from said real property and that no speed at which said material will be extracted is specified in said provisions;

c. That the removal of machinery, plant, buildings, etc., by plaintiff from said property within 120 days after acceptance from the contractor of the completed dam by the United States of America may, or may not, be within a period of two years from taking possession [36] of said real property, in that said completed dam may never be accepted by plaintiff and said machinery may never be removed;

d. That it is impossible to determine the manner or rate at which these defendants should operate their gold recovery devices in that no rate of removal of material from the aforesaid real property is specified or determined;

e. That a vertical drop of not more than 20 feet for material which will pass a standard $\frac{1}{4}$ " screen may, or may not, be adequate for the recovery of gold from the materials removed, dependent upon

the speed at which plaintiff removes the same and that no rate of removal is specified in the complaint;

f. That a vertical drop of not more than 8 feet for material which is retained on a standard $\frac{1}{4}$ " screen, and passes a standard 1" screen, may, or may not, be adequate for the removal of gold from the material removed from the real property by plaintiff, dependent upon the rate at which plaintiff removes the same and that no rate of removal is specified in the complaint; that it may, or may not, be possible to return all material after the recovery of gold and other precious minerals by force of gravity at the same rate and of the same consistency as delivered to the gold recovery devices with a loss of not more than 5 per cent, dependent upon the rate at which plaintiff removes said material from the real property described in the complaint and that no rate of removal of said material is specified in the complaint.

g. That no devices or appliances for the recovery of gold are determined in the specifications set forth in said paragraph nor in any provision therein made for the amount of gold, if any, to be recovered;

Further answering said paragraph, these defendants allege that in the event these defendants, or any of them, are [37] unable to comply with the specifications set forth in said complaint, an exact determination of the loss to these defendants, or any of them, by reason of the recovery of the gold content from the material taken, cannot be ascer-

tained, and in the event plaintiff elects to carry out the requirements set forth in said paragraph, no means or appliances are therein specified and it will be impossible to determine whether or not the devices used by plaintiff are adequate to remove, or are successful in removing, all, or any substantial part of the gold content of the material removed by plaintiff from the said real property;

Further answering said paragraph, these defendants allege that no provision is made in said specifications for the part or portion of said real property from which said material will be removed; that the gold content of the sand and gravel on said real property varies throughout said real property; allege that in all portions of said sand and gravel deposit on said real property the gold content is at least $1/66$ of a troy ounce per cubic yard of sand and gravel and in places exceeds $1/3$ of a troy ounce of gold per cubic yard of sand and gravel; that unless plaintiff specifies the part or portion from said gravel bar from which plaintiff proposes to remove said sand and gravel or other concrete aggregates, it will be impossible to determine the amount of gold taken by plaintiff from said real property and the consequent loss, or damage, if any, to these defendants, and each of them;

Further answering said paragraph, these defendants allege that the real property from which plaintiff seeks to take said sand and gravel and other concrete aggregates is all that certain real property situate lying and being in the Counties of Placer and El Dorado, State of California, and

more particularly described as the East half ($E\frac{1}{2}$) of the West half ($W\frac{1}{2}$) of the Southeast quarter ($SE\frac{1}{4}$) of Section Twenty-three (23), Township Thirteen (13) North, Range Nine (9) East, Mount Diablo Base and Meridian; allege that said real property is not delineated and bounded as set forth in the complaint but is delineated and [38] bounded as follows, to-wit:

Beginning at a point marking the Southeast corner of the Southeast quarter of the Southwest quarter of the Southeast quarter of Section 23, Township 13 North, Range 9 East, M.D.B. & M., said point bearing South $89^{\circ} 59' 30''$ West and distant 1346.16 feet from the corner common to Sections 23, 24, 25 and 26, Township 13 North, Range 9 East, M.D.B. & M., and running thence along the line between Sections 23 and 26 of the aforesaid township and range, South $89^{\circ} 59' 30''$ West 673.08 feet to the Southwest corner of the Southeast quarter of the Southwest quarter of the Southeast quarter of said Section 23; thence along the North and South line on the West side of the East half of the West half of the Southeast quarter of said Section 23, North $0^{\circ} 37'$ West 2596.61 feet to the Northwest corner of the Northeast quarter of the Northwest quarter of the Southeast quarter of said Section 23; thence along the East and West one-half Section line of said Section 23 South $87^{\circ} 25'$ West 660.74 feet to the Northeast corner of the Northeast quarter of the Northwest quarter of the Southeast quarter of said Section 23; thence along the North and South line on the East side of the East

half of the West half of the Southeast quarter of said Section 23; South $0^{\circ} 54'$ East 2626.52 feet to the point of beginning, all of the above bearings being fixed by reference to true North Meridian;

Alleges that the map or plat attached to the complaint for the foregoing reasons does not truly show the land from which plaintiff seeks to remove said sand and gravel and other concrete aggregates;

VI.

Answering paragraph V alleges that plaintiff does not propose to take such sand and gravel and other material commonly known as concrete aggregates from the aforesaid lands for the purpose of carrying out the construction of the Ruck-a-Chucky Dam and Reservoir project as originally contemplated and allege that the sand and gravel and other materials commonly known as concrete aggregates sought to be taken therefrom are not expedient or necessary or proper in the carrying out of the construction of said Ruck-a-Chucky Dam and Reservoir project; allege that the Ruck-a-Chucky Dam and Reservoir project as originally contemplated has been abandoned and that plaintiff seeks by this action to take sand and gravel and other materials commonly known as concrete aggregates in an amount now unknown for a project now undetermined and other than that originally contemplated when this action was filed; allege that for the reasons set forth hereinabove, the provisions for the recovery of said gold are inadequate for the protection of the rights of these defendants

and will not compensate these defendants in any [39] manner, or at all, for the damage which will be sustained by these defendants if plaintiff be permitted to remove sand and gravel and other materials commonly known as concrete aggregates as therein specified;

VII.

Answering paragraph VI, these defendants are informed and believe, and therefore state, that adequate funds are not available for paying any awards that may be granted herein to any of the above named defendants or to anyone having an interest in said land from any source, or at all; allege that a portion of the gravel and sand on said real property contains gold in quantities in excess of $1/3$ of a troy ounce per cubic yard of sand and gravel and that the value of the gold per cubic yard in such portions exceeds the sum of \$12 per cubic yard; that these defendants are informed and believe, and therefore state, that plaintiff proposes to take the portion of the gravel on said real property containing gold content of that value and of that quality and proposes to take at least 70,000 cubic yards thereof and that the loss to these defendants by reason of the taking thereof, exclusive of the value of the sand and gravel and other materials commonly called concrete aggregates, from that portion will damage these defendants in a sum exceeding \$840,000; that until plaintiff specifies the part or portion of said bar from which plaintiff will take said gravel and excludes the part or portion containing gold of a quality per cubic yard

as above set forth, these defendants will be damaged in that sum or greater;

That defendants propose to mine said real property and to extract and recover the gold therefrom; that the net profit which defendants will derive during the period of two years which plaintiff has possession of said real property will exceed the sum of \$500,000 per year; that if defendants are compelled to defer said profits for a period of two years defendants will be damaged to the amount of the interest at seven per cent per annum on said profits for a period of two years [40] and that said damage to these defendants will exceed the sum of \$70,000;

Further answering said paragraph, allege that at all times herein mentioned the reasonable value of the gravel sought to be taken by plaintiff from said real property has been and is the sum of \$1.00 per cubic yard thereof and that the reasonable value of the sand sought to be taken by plaintiff from said real property has been and is the sum of \$2.00 per cubic yard; that plaintiff does not now know and these defendants do not now know the exact amount or the approximate amount of sand or gravel sought to be taken by plaintiff from the aforesaid real property and until said exact amount becomes known, these defendants are unable to state the loss which they will sustain if plaintiff takes sand or gravel from said real property;

VIII.

Answering paragraph VII, allege that they have no information or belief with respect to the allegations contained in said paragraph and for that reason and placing their answer upon that ground deny each and every, all and singular, generally and specifically the allegations therein contained;

IX.

Answering paragraph VIII, admit that plaintiff, through the Secretary of War of the United States of America, has endeavored to acquire a quantum of said estate as set forth in paragraph IV of the complaint and described in paragraph V of this answer; admit that plaintiff has been unable to acquire the same at the price or upon conditions and terms offered by it; allege that the price and the terms and the conditions, if any, which plaintiff, through the Secretary of War of the United States of America, has determined to offer are unreasonable and unfair to these defendants; allege that these defendants at all times herein mentioned have been and now are willing to sell to plaintiff any quantum of estate in the land described in paragraph V of this answer for any purpose, or at all, provided these [41] defendants are justly compensated and if the terms and conditions for the taking thereof by plaintiff are reasonable and just both to plaintiff and to these defendants;

X.

Answering paragraph IX, admit that plaintiff has been in possession pursuant to the statute there-

in set forth continuously since the 17th day of October, 1939, and have thereby prevented these defendants, or any of them, from taking any part or portion of the gold content from the sand and gravel on said real property and have damaged these defendants by reason thereof to the extent of \$200 for each and every day that plaintiff has been in possession thereof and that these defendants will continue to be damaged at the rate of \$200 for each and every day that plaintiff continues in possession thereof;

XI.

Answering paragraph X, allege that they have no information or belief with respect to the allegations contained in said paragraph and for that reason and placing their answer upon that ground deny each and every, all and singular, generally and specifically, the allegations contained in said paragraph;

XII.

Answering paragraph XI, deny that the use sought to be made by plaintiff of the sand and gravel and other materials commonly known as concrete aggregates planned to be taken from the property described in paragraph V of this answer, or the other use sought to be made of said property, is a public use; allege that said use is for private gain; deny that the improvement sought to be made is now either planned or located in a manner most compatible with the greatest public good or the least private injury, or is planned or located at all;

XIII.

Answering paragraph XII, deny each and every, all and singular, generally and specifically the allegations therein contained;

XIV.

Answering paragraph XIII, deny each and every, all and [42] singular, generally and specifically the allegations therein contained;

XV.

Answering paragraph XV, allege that on the 28th day of August, 1940, plaintiff executed and issued a patent upon a certain mineral entry numbered 031856 in the United States Land Office at Sacramento, California; that said patent was issued to defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel; that said patent was delivered to defendants F. M. O'Connor, Stella M. O'Connor, his wife, and R. J. Miedel on the 6th day of September, 1940; that said land patent named as patentee Fred M. O'Connor, Stella M. O'Connor, and Russel J. Miedel; that the said Fred M. O'Connor is the same person as defendant F. M. O'Connor; that Stella M. O'Connor therein named is the same person as defendant Stella O'Connor; that the Russel J. Miedel therein named is the same person as defendant R. J. Miedel; allege that ever since said 6th day of September, 1940, defendants F. M. O'Connor, Stella O'Connor and R. J. Miedel have been and are the owners of said patent and entitled to the possession

thereof free and clear of any claims of plaintiff United States of America, save and excepting such claims as plaintiff United States of America may have acquired by virtue of the entry into possession as set forth in paragraph X herein;

XVI.

Answering paragraph XVI, allege that none of the defendants named in the complaint have any right, title or interest in or to said real property save and excepting defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel; allege that defendants F. M. O'Connor and Stella O'Connor, his wife, are owners of a one-half interest in and to said real property and that defendant R. J. Miedel is the owner of a one-half interest in and to said real property, subject to the rights of the said R. J. Miedel derived by virtue of an agreement in writing; that said agreement in writing was executed on the 4th day of May, 1939, by defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel and by each delivered to the other; that a copy of said agreement is attached to this answer and marked Exhibit "A"; [43] that the said agreement is hereby incorporated and made a part hereof as if the same were herein set forth in full; allege that each of the previous leases and modifications and suspensions thereof were executed on the dates set forth therein by the parties whose names are subscribed thereto and on said date by each delivered to the other; that copies of each of said agreements are hereto attached and marked

respectively Exhibit "B," "C," and "D," being so lettered in accordance with their respective priorities as to time, and each of said agreements is hereby incorporated and made a part hereof as if the same were herein set forth in full; allege that all of the parties executing said documents; or any of them, save and excepting defendants F. M. O'Connor and Stella O'Connor, his wife, did, subsequent to the execution and delivery of said instruments, assign, sell, transfer and set over their right, title and interest in and to said real property to defendant R. J. Miedel, and that defendant R. J. Miedel ever since has been and is now the owner of the rights therein given to said assigning defendants;

XVII.

Answering paragraph XVII, deny that any person or persons other than defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel have any right, title, or interest in or to said real property;

XVIII.

Answering paragraph XIX, allege that they are informed and believe and therefore state that the Congress of the United States has not appropriated sufficient funds for the acquisition of the right to use and occupancy of the land described in the complaint or the land described in this answer or sought to be taken, and deny that there are sufficient funds now available for the payment of just or reasonable compensation therefor;

XIX.

Answering paragraph XX, deny that the public use or interest or convenience or necessity require that the quantum of the estate in the land described in the complaint or the land described in this answer or the appurtenances thereto, or any [44] quantum, or any estate in any lands, be appropriated to the extent or for the purposes, or acquired or taken for the purposes set forth in the complaint, or for any purpose, or for the purposes set forth in Document No. 50, or in the recommendation of the Chief of Engineers therein contained;

XX.

Answering paragraphs XII, XXIII, XXIV, XXV, XXVI, XXVII, XXVII½, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIV, and XXXV of the complaint, these defendants repeat the allegations, admissions and denials contained in paragraphs XV and XVI of this answer and hereby incorporate the same and make the same a part hereof as if the same were herein set forth in full;

Wherefore, these defendants pray judgment in their favor, as their rights may be found to appear, for the recovery of damages in an amount which the court may find these defendants, or the persons entitled thereto may have justly sustained by reason of the determination of use of said real property by plaintiff as set forth herein and that plaintiff be denied any right to take any part or portion of the real property described in the com-

plaint, or described in this answer, and for such other and further relief as may be proper in the premises, and for their costs of suit.

R. J. MIEDEL.

State of California,
County of Alameda—ss.

R. J. Miedel, being first duly sworn, deposes and says: That he is one of the defendants above named; that he has read the foregoing answer and knows the contents thereof; that the facts therein stated are true of his own knowledge, except as to the facts therein stated on information and belief, and as to those facts he believes it to be true.

R. J. MIEDEL.

Subscribed and sworn to before me this 12th day of March, 1941.

[Seal] R. B. SOMERBY,
Notary Public in and for the County of Alameda,
State of California.

Subscribed and sworn to before me this 14th day of March, 1941.

[Seal] CHAS. O. BRUCE,
Notary Public in and for the County of Alameda,
State of California.

FRANCIS T. CORNISH,
Attorney for These Answer-
ing Defendants. [45]

[Endorsed]: Filed March 25, 1941. [46]

EXHIBIT "A"

AMENDED LEASE

This Agreement, made and entered into this 4th day of May, 1939, by and between F. M. O'Connor and Stella M. O'Connor, his wife, lessors, and R. J. Miedel, lessee, witnesseth;

That Whereas, on the 31st day of October, 1934, F. M. O'Connor, and Stella M. O'Connor, his wife, F. A. Crone and D. A. Crone did lease to R. J. Miedel and associates for a period of five years from said date, or until the property therein described was fully mined, certain real property then belonging to the lessors in said lease, and

Whereas, since entering into that lease, lessee herein has acquired the right, title and interest of D. A. Crone and F. A. Crone, and is now the owner of an undivided one-half interest in and to the real property hereinafter described, and

Whereas, it has been impractical to mine the said real property for a period in excess of four years because of pending litigation and clouds on the title thereto and a pending application for a United States Land Patent, and lessors have suspended the working requirements of said lease, and lessee has advanced the funds so far necessary to conduct and defend said litigation, and to obtain said United States Land Patent, and

Whereas, the real property herein referred to is all that certain piece or parcel of real property situate, lying and being in the Counties of Placer

and Eldorado, State of California, and more particularly described as follows, to-wit:

The East half ($E\frac{1}{2}$) of the west half ($W\frac{1}{2}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section 23, Township 13 North, Range 9 East, M. D. B. & M.

And Whereas, the United States of America has declared through its War Department Engineers stationed at Sacramento that it intends to condemn the right to remove gravel from said real property unless satisfactory negotiations can be entered into between lessee and the United States of America, and said condemnation will preclude the mining of a portion or all of the aforesaid real property during the time said gravel is being removed and for a period not to exceed three years,

Whereas, the parties, in view of the aforesaid circumstances, desire to modify and extend said lease, and to lease to lessee herein alone;

Now, Therefore, said lease of October 31, 1934, and the subsequent modifications and suspensions thereof, are hereby modified, and it is hereby agreed as follows:

Lessors do by these presents lease, demise and let to lessee the sole and exclusive right to mine upon and in, and to take minerals from, and to sell and negotiate for the sale of minerals in, or upon, the aforesaid real property, severed or unsevered therefrom.

The duration of this lease shall be for a period of five years from date hereof, and for as long

thereafter as it shall be commercially practicable to mine the said real property.

Lessee agrees to mine the said real property. Said mining may commence at once, and shall in any event commence not later than ninety days following the issuance to the parties of a United States Land Patent and shall continue thereafter for the life of this lease, continuously. The process of installing machinery or equipment or repairing machinery or equipment shall be considered as mining. Any failure to mine said property for a period of ninety consecutive days shall be construed a violation of the terms of this lease, unless lessee shall be prevented therefrom by strikes, act of God, or for any other reason not within the control of lessee, or unless the water level on said property interferes with the place or manner lessee is at that time engaged in mining said property, or during such seasons as weather makes use of roads to said property in connection with the mining thereof dangerous or impractical.

It is further agreed that while the United States of America or its licensee or assignee shall be in possession of the aforesaid real property or any portion thereof, or negotiating [48] therefor, or in the process of condemning any rights therein, lessee shall not be precluded from mining any other part or portion thereof, but said period shall suspend the working requirements herein imposed upon lessee and shall extend the term of this lease pro tanto.

Lessee agrees before the time at which mining

shall commence hereunder to place, or commence in good faith to place, upon said property the necessary machinery and equipment to develop and work said mining property in a manner meeting with the approval of such mining engineers or consultants as lessee may select.

There shall be no obligation on the part of lessee to recover any minerals other than gold, although nothing herein shall prevent lessee from recovering or selling other minerals or mineral substances. All gold recovered shall be shipped to the United States Mint and a duplicate mint receipt shall be furnished to lessors.

Lessee agrees to pay lessors $7\frac{1}{2}$ per cent of any amount received from the United States Mint for said gold recovered, said payments to be made not later than ten days following the receipt by lessee of payment by the United States Mint for any shipment of gold.

All other minerals taken by lessee from said property, or sold by lessee either on or off said property, or severed or unsevered therefrom, shall be sold for what lessee considers a fair and reasonable price and lessee shall pay to lessors 5 per cent of any amount received by lessee as the purchase price of said minerals, or the right to remove the same, including sand and gravel, said payments to be made within ten days after a receipt by lessee of the aforesaid purchase price.

Lessee agrees to notify lessors of any intended cleanups and lessors may be present thereat. Such

notice shall be given in any manner reasonably calculated to communicate that fact to lessors.

Lessee shall have the sole determination of what shall constitute a complete and thorough working of the property above [49] described and when the same shall have been exhausted for the purpose of mining and shall have complete control of the aforesaid property, and of the method of mining same, subject only to the right of lessors, by agent or in person, to inspect the aforesaid property and machinery at any reasonable time.

Regardless of the reason for the termination of this lease, lessee shall have such time as is reasonable, in no event less than 60 days, within which to remove any materials, equipment, machinery, buildings, or other property heretofore or hereafter placed on the said real property by lessee or predecessors of lessee.

In the event of a breach by lessee, a forfeiture of this lease shall not be declared until lessors shall first have delivered to lessee notice in writing advising lessee of the nature of said default and ninety days shall have elapsed under such notice, and lessee shall within that time have failed to remedy said default, except failure to continually mine, in which event lessee shall have said second period of ninety days within which to resume mining said property in good faith.

Lessee shall have the right to assign this lease or to enjoy the same either through himself or through his agents or sublessee. All of the terms, covenants and conditions, however, shall be binding

upon the respective parties, their heirs, administrators, sub-lessees and assigns.

In Witness Whereof the parties have hereunto set their hands the day and year in this instrument first above written.

F. M. O'CONNOR

STELLA M. O'CONNOR

Lessors

R. J. MIEDEL

Lessee [50]

State of California

County of Placer—ss.

On this fourth day of May in the year One Thousand Nine Hundred and thirty-nine before me, Marshall Z. Lowell, a Notary Public in and for the County of Placer, personally appeared F. M. O'Connor and Stella M. O'Connor, his wife, and R. J. Miedel know to me to be the persons whose names are subscribed to the within instrument, and they acknowledge that they executed the same.

Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the County of Placer, the day and year in this certificate first above written.

[Seal]

MARSHALL Z. LOWELL

Notary Public in and for the County of Placer,
State of California.

My commission Expires July 24, 1941. [51]

EXHIBIT "B"

This Agreement and Lease entered into this 31st day of October, 1934, by and between F. M. O'Connor and Stella M. O'Connor, his wife, D. A. Crone and F. A. Crone, Lessors, and R. J. Miedel and Associates, Lessees,

Witnesseth:

That the said Lessors, for and in consideration of the rents, royalties, covenants and agreements hereinafter set forth and by the said Lessees to be paid, kept and performed, have let and by these presents do let unto the said Lessees, and said Lessees do hire and take from Lessors, all of the following mine and mining property heretofore owned and described as the Spanish Bar and being situate in the Counties of Placer and Eldorado in the State of California, and being the East one-half of the northwest quarter, of the southeast quarter and the East half of the southwest quarter of the southeast quarter of Section 23, Township 13 north range nine East M. D. B. & M. as described in that certain location notice heretofore and on the 28th day of August, 1934, filed by Lessors in the United States land office at Sacramento, California, together with the appurtenances; to have to hold the same unto said Lessees for the term of five years from and after the date hereof, or until said mine (the same being placer mine), is fully worked and mined out, unless sooner forfeited as hereinafter specified.

And in consideration of said lease, said Lessees do covenant and agree with said Lessors as follows, to-wit:

To enter upon said mine and premises and work the same in a manner necessary to good and economical mining, said work to continue steadily and continuously from the date of this lease, and any failure to work said mining property for a space of ten consecutive days, Sundays and holidays excepted, (unless prevented therefrom by the Act of God, high or flood water, strikes, or for some reason not within the control of Lessees) shall be considered a violation of the terms of this lease—to, within a reasonable time hereafter, place upon said mining property the necessary machinery and equipment to properly develop and work said mining property.

From time to time, when in the judgment of Lessees it shall [52] be deemed proper so to do, clean-ups shall be made and when received shall be shipped by Lessees or transmitted to a United States Mint and/or smelter, and Lessees agree to furnish Lessors with a duplicate mint or smelter receipt when received and from the gross receipts or proceeds from the sale or disposal of said gold or minerals, said Lessees agree to pay over and deliver to the said F. M. O'Connor and Stella M. O'Connor, his wife, an undivided seven and one-half per cent ($7\frac{1}{2}$) thereof, and to F. A. Crone and D. A. Crone seven and one-half per cent ($7\frac{1}{2}$) making a total thereof of fifteen per cent (15%), save that black sand shall be cleaned up if

it will pay to do so and F. M. O'Connor and Stella M. O'Connor shall receive five per cent (5%) and D. A. Crone and F. A. Crone shall receive five per cent (5%) of the gross royalty of the proceeds of such sand that may be received from said sand, and any other by products (sand, gravel, etc.) well and truly to be paid as the free gold cleaned up is paid.

Said Lessees hereby agree to give notice of the time of any and all intended clean-ups to Lessors so that Lessors may be present thereat, if they so desire, said notice or notices to be given either verbally, by telephone or through the United States Mail.

Any personal property owned by Lessors, or either of them, now on said premises may be removed therefrom without expense to Lessees.

Said Lessees shall have the sole determination of what shall constitute a complete and thorough working of the placer mining property leased hereunder and when in the judgment of said Lessees the same shall have been exhausted for the purpose of extracting gold and minerals therefrom, it being understood and agreed that Lessees shall have immediate possession and complete control of said mining property for the purposes herein enumerated.

It is understood by all parties to this lease that a certain one hundred and fifty foot strip is reserved from the terms of this lease and assigned as the exclusive property of F. M. O'Connor. [53]

It is also agreed that Lessors shall at all times,

either by themselves or by a representative be entitled to a full and complete inspection of said mine and mining property and the operation of the same by said Lessees.

As and when, in the judgement of the Lessees, said mining property shall be exhausted for the purpose of extracting gold and mineral therefrom Lessees shall have the right to peaceably and quietly withdraw therefrom, and shall have the right to remove all tools, materials, mining accessories and machinery theretofore placed thereon and used by said Lessees in and upon said mining property, and this lease shall thereupon cease and terminate.

Lessees further agree in connection with said mining operations on said property to conform to all housing laws of the State of California and to see that all safety laws are rigidly enforced for the protection of employees engaged in said mining activities on said mining property.

In the event Lessees fail to perform the terms, covenants and conditions of the within agreement and lease, it shall be lawful for Lessors to re-enter and take possession of said premises and terminate this lease.

This agreement and all its terms, covenants and conditions shall be binding upon the parties hereto, their heirs, administrators and assigns, and time is of the essence hereof.

Witness the hands of the parties hereto in triplicate the day and year first above written.

MRS. STELLA M. O'CONNOR

F. M. O'CONNOR

D. A. CRONE

F. A. CRONE

R. J. MIEDEL

R. B. SOMERBY

W. H. MORRISON

W. F. FISHER

EXHIBIT "C"

MODIFICATION OF LEASE

This Agreement made and entered into this...day of 1935, by and between F. M. O'Connor and Stella M. O'Connor, his wife herein referred to as lessors, and R. J. Miedel and Associates, hereinafter referred to as lessees,

Witnesseth

That Whereas the parties herein together with D. A. Crone and F. A. Crone did, on the 31st day of October, 1934, enter into an agreement in writing by the terms of which the lessors and the said D. A. Crone and F. A. Crone did lease to lessees that certain piece or parcel of real property situate, lying and being in the counties of Placer and El Dorado, State of California, more particularly described as the east one-half (E1/2) of the west

one-half ($W\frac{1}{2}$) of the southeast one-quarter ($SE\frac{1}{4}$) of Section twenty-three (23) Township thirteen (13) north, range nine (9) east M. D. B. & M., under the terms and provisions of said agreement, to which agreement reference is hereby made for further particulars.

And Whereas under and by virtue of the terms and provisions of said agreement of October 31, 1934, it was provided as follows: "It is understood by all parties to this lease that a certain one hundred and fifty foot strip is reserved from the terms of this lease and assigned as the exclusive property of F. M. O'Connor",

And Whereas the parties are desirous of eliminating said reservation and lessor desires that the said portion so reserved shall be mined and lessee desires to mine the same.

Now Therefore It Is Agreed by and between the parties hereto that said portion so reserved as the sole and exclusive property of said F. M. O'Connor under and by virtue of the terms of said agreement of October 31st, 1934 shall be no longer reserved from the said lease, and that said lease of October 31st, 1934, shall be and the same is hereby amended so as to eliminate said reservation from the terms and provisions thereof.

In consideration therefor, lessees agree to pay to F. M. O'Connor and Stella M. O'Connor, his wife. the same [55] royalties, for the use of said property as lessees agreed to pay to lessors, F. M. O'Connor and Stella M. O'Connor, his wife, under and by virtue of the terms and provisions of said lease

of October 31st, 1934, for the use of the property therein leased.

It is expressly understood and agreed that said agreement and lease of October 31st, 1934, is by these presents modified only to the extent necessary to eliminate the said reservation from the terms and provisions thereof.

It is further expressly understood and agreed that the requirements of said lease for the continued working of the property herein leased have been suspended pending the final determination of an action now pending in the Superior Court of the State of California, in and for the County of Placer, numbered therein 10041 and entitled, American River Gold Mining Company, a corporation, Plaintiff, v. F. M. O'Connor, Stella M. O'Connor, F. A. Crone, D. A. Crone, John Doe Corporation, Richard Roe and Jane Doe, Defendants and that the said agreement for the suspension of working requirements upon said property shall be, and it is hereby extended to include the portion of the real property reserved from the operation of said agreement of October 31st, 1934, and nothing in this agreement, or in said agreement of October 31st, 1934 shall be construed as requiring lessees to perform any labor upon said reserved portion other than as required by said agreement of October 31st, 1934 and said suspension of operations agreement thereafter executed and herein referred to.

In Witness Whereof the parties have hereunto set their hands this day and year first hereinabove mentioned.

F. M. O'CONNOR

MRS. STELLA M. O'CONNOR

EXHIBIT "D"

EXTENSION AGREEMENT

This agreement, made and entered into this 4th day of December, 1936, by and between F. M. O'Connor and Stella M. O'Connor, his wife, herein referred to as lessors, and R. J. Miedel, and associates, herein referred to as lessees,

Witnesseth:

That Whereas the parties herein together with D. A. Crone and F. A. Crone did, on the 31st day of October, 1934, enter into an agreement in writing by the terms of which the lessors and the said D. A. Crone and F. A. Crone did lease to lessees that certain piece or parcel of real property situate, lying and being in the Counties of Placer and El Dorado, State of California, more particularly described as the east one-half ($E\frac{1}{2}$) of the west one-half ($W\frac{1}{2}$) of the southeast one-quarter ($SE\frac{1}{4}$) of Section twenty-three (23) Township thirteen (13) north, range nine (9) east, M. D. B. & M., under the terms and provisions of said agreement, to which agreement reference is hereby made for further particulars.

And Whereas lessees have since the execution

and delivery of said lease acquired the right, title and interest of the said D. A. Crone and F. A. Crone in said real property.

And Whereas said agreement was modified by the parties by supplemental agreement so as to eliminate the reservation of a portion of said real property; to which said supplemental agreement reference is hereby made for further particulars.

And Whereas lessees desire to apply for a patent to said real property to be taken in the name of F. M. O'Connor and Stella M. O'Connor, his wife, as owners of a half interest and R. J. Miedel as owner of the remaining half interest.

Now, Therefore, it is agreed that for and in consideration of the said R. J. Miedel advancing the necessary funds with which to acquire said patent to said real property, lessors will, after said patent has been granted, reimburse the said R. J. Miedel to the extent of one-half of the expenditure so made to acquire said patent. [57]

And lessors further consent that the requirements in said lease for the continued working of the property therein described shall, in consideration of the advancing of said funds by the said R. J. Miedel, be suspended until thirty days after the final determination of the United States Patent Office on the said application for a patent.

Nothing in this agreement shall be construed as requiring the commencement of proceedings to acquire a patent until thirty days after the final determination of the litigation now pending in the Superior Court of the State of California, in and

for the County of Placer, in Action No. 10041, nor shall anything herein be construed to prevent lessees from mining the said real property pursuant to the terms and provisions of said lease, should lessees so elect, during the time that said working requirements are suspended, nor shall the working of said property by lessees during the time said working requirements are suspended be construed as an election on the part of lessors or lessees to in any manner affect suspension of working requirements herein provided for.

In Witness Whereof the lessors and lessees have hereunto set their hands this day and year first hereinabove mentioned.

.....
.....

Lessees

F. M. O'CONNOR

Lessor

MRS. STELLA M. O'CONNOR

[Title of District Court and Cause]

NOTICE OF ABANDONMENT OF THIS
CONDEMNATION PROCEEDING

To: The Above Named Defendants, and to Francis T. Cornish, Esq., Attorney for Defendants, F. M. O'Connor, Stella O'Connor, his wife, R. J. Miedel, R. B. Somerby, W. H. Morrison, W. F. Fisher, Jack Ward, and Irene Brinton, Sued Herein As Irene Gannett:

You, and each of you, are hereby notified that the above-named plaintiff, by Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, upon the express authority and direction of the Attorney General of the United States of America, hereby abandons the further prosecution of the above-entitled condemnation proceeding, for the reason that in the opinion of the plaintiff it is unnecessary to acquire the estate or interest in the land described in the complaint on file herein, or any part thereof, and that the acquisition thereof would not be for the best interests of the plaintiff.

Dated: September 12, 1941.

FRANK J. HENNESSY,
United States Attorney

EMMET J. SEAWELL
Assistant United States At-
torney,

R. B. McMILLAN
Assistant United States At-
torney,
Attorneys for Plaintiff,
United States of America.

[Endorsed]: Filed Sep. 13, 1941. [60]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT DISMISSING
THIS CONDEMNATION PROCEEDING

Now comes the above named plaintiff, by Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, having heretofore been duly authorized and directed by the Attorney General of the United States so to do, and moves this Court to give, make and enter its judgment dismissing the above-entitled condemnation proceeding, for the reason that in the opinion of the plaintiff it is unnecessary to acquire the estate or interest in the land described in the complaint herein, or any part thereof, and that the acquisition thereof would not be for the best interests of the plaintiff.

Dated: September 12, 1941.

FRANK J. HENNESSY,

United States Attorney

EMMET J. SEAWELL,

Assistant United States At-
torney,

R. B. McMILLAN

Assistant United States At-
torney,

Attorneys for Plaintiff,

United States of America.

[Endorsed]: Filed Sep. 13, 1941. [62]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco on Wednesday the 15th day of April, in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

Plaintiff's motion for judgment dismissing this condemnation proceeding came on this day for further hearing. Robert B. McMillan, Esq., Assistant United States Attorney, appeared as attorney for the plaintiff and Francis F. Cornish, Esq., appeared as attorney for certain defendants. After further hearing the attorneys, it is Ordered that the motion for judgment dismissing this condemnation proceeding be and the same is hereby denied in accordance with an order to be signed and filed herein, to which ruling of the Court the plaintiff then and there duly excepted. After further hearing the attorneys, it is Ordered that this case heretofore set for April 23, 1942, be and the same is hereby continued from April 23, 1942 to June 15, 1942, to be then set for trial at Sacramento, California. [63]

[Title of District Court and Cause.]

OPINION AND ORDER

In this proceeding in condemnation, the United States had the exclusive use and occupancy of the lands of the defendants for a period of one year and eleven months, commencing October 17, 1939. Thereupon, these proceedings were abandoned by the plaintiffs and the lands were returned to the defendants in the same condition as when entered upon by the United States.

The use and occupation of these lands was by virtue of an order of this court authorizing the advance taking of possession and use of the defendants' property to the extent of the interest sought to be acquired therein in this action. This use and occupation resulted in the taking of a substantial [64] possessory interest in the land. To the extent of the taking which actually occurred, there arose an obligation on the part of the plaintiff to pay just compensation therefor to the defendants in this proceeding. And plaintiff's right to a dismissal with respect to whatever interest in the defendants' property had not yet been taken prior to the abandonment, was properly made conditional upon the ascertainment and award herein of just compensation with respect to that which had already been taken from defendants and could not thereafter be returned. Thus was fulfilled the pledge of the United States, inherent in the terms of the constitutional guaranty of the Fifth Amendment, to provide to the owner of private property

taken for a public use, a reasonably expeditious and inexpensive method of ascertaining and paying the just compensation to which he is entitled.

The defendants contend that the United States took from them more than the temporary possession of their lands; that the United States also took the right, during occupancy, to remove all the mineral contents therefrom—sand, gravel and gold—and to use the property for any other purpose incidental to the construction of the proposed dam and reservoir on the American River; and that the United States must compensate them for the taking of this right of user, although the same was concededly never exercised. Defendants, however, fail to show wherein they suffered any pecuniary loss for which the law allows compensation, as a result of the alleged taking of this intangible right. The evidence shows no diminution in the market value of the defendants' lands by reason of any acts committed thereon by the United States under claim of right of user during the period of its occupancy. The defendants still have their lands intact. They didn't lose any sand, gravel or gold. It is established law that just compensation is not to be based on what the condemnor might have gained by the taking, but upon what the condemnee lost thereby.

Evidence was offered by the defendants tending to show the value of the mineral contents of the land separate [65] from the value of the land itself. The defendants still have the mineral contents and just compensation does not entitle them to their

value as well, no matter how we define in legal terms the quantum of the estate or interest taken by the United States.

The fallacy of defendants' position with respect to the extent of their right to compensation herein lies in this,—that due regard has not been given by them to the fact that in every case, value as a basis of just compensation for the taking of an interest in private property, however we regard that interest, must reflect either actual or reasonably probable pecuniary loss to the owner. And defendants' argument that this case must be considered as if the United States not only took possession of their lands, but also depleted the same of their entire mineral contents, regardless of the fact that the lands were returned to the defendants undisturbed, simply loses sight of what the constitutional guarantee of just compensation for the taking of private property for a public use was intended to accomplish. The requirement of just compensation for the taking of property is wholly fulfilled by an award based upon the pecuniary loss shown to have been suffered by the owner.

Whatever basis for the estimation of just compensation would have been adopted in this case had a declaration of taking been filed at the institution of these proceedings, or had these proceedings not been abandoned, need not now be considered. In either of these events, a different factual situation would have been presented calling for the application of such estimates of value which would make defendants whole for whatever pecuniary loss they

had actually suffered or, in all reasonable probability, might be expected to suffer in view of the circumstances there shown to exist.

That value is to be ascertained as of the date of taking is the general rule. This principle has reference to the time at which market values are to be fixed. In this case, no market value, as that term is defined in the law of eminent domain, [66] has been proved as of any date for the intangible right of user allegedly taken by the United States considered as property separate and apart from the tangible thing, the land itself, to which the right relates, and from any possessory interest, therein.

Loss of profits which might have been realized from the use to which the defendants contemplated putting their property, but for the taking, is not recognized in the law as an element to be considered in the fixing of just compensation for the taking. This much defendants concede. It involves the consideration of too many speculative elements to afford any accurate measurement for the estimation of property values. In fact, assuming that defendants' theory of the taking to be the correct one, still they have produced no evidence to this court which would warrant the basing of any estimate of value upon the intangible right of use allegedly taken by the plaintiff when it occupied defendants' property, and of which it could be said the defendants were deprived by the occupancy. The burden of proving pecuniary loss lay with the defendants. They did not sustain this burden by showing loss of profits they might have realized

but for the temporary occupancy of the plaintiff; or the value of the mineral contents of their land, which they still have; or by submitting in evidence a maze of statistical data having no reasonable relation to the ultimate fact to be proved, namely, the compensable pecuniary loss suffered by the taking.

Defendants are entitled to just compensation for the taking of possession of their lands by the plaintiff for the period of plaintiff's occupancy. If rights other than the right of possession did actually vest in the United States when it occupied defendants' lands,—the right for a limited period to remove minerals and to make other uses of the land incidental to the construction of the dam,—no increase in the amount of just compensation has accrued thereby to the defendants over and above that to which they are entitled for the temporary occupancy of their land, because no pecuniary loss has been occasioned thereby to the defendants. [67] The rights were not exercised and there was no consequent diminution in the value of the lands of the defendants. And no market value has been established for them as property separate and apart from the land itself.

The remaining matter for determination is the question of what award defendants shall be entitled to for the taking and holding of the temporary bare possession of their lands prior to the abandonment of these proceedings by the plaintiff. While there is no evidence of the reasonable rental value of the defendants' property, there is sufficient in the record upon which to base an award

of compensation having reasonable relation to the detriment suffered by the defendants as a result of the use and occupation of their property by the plaintiff. The highest estimate of the market value of the fee simple of the defendants' lands, at the time entry was made by the plaintiff, was \$13,000.00. An award of compensation has been suggested by plaintiff in an amount equal to interest at the prevailing commercial rate on the full value of the defendants' property for the period of governmental occupancy, with interest on such amount from the date of taking possession until payment of the award. Defendants admit that an award on this basis for the occupancy of their lands is fully adequate. I also am satisfied that it would afford defendants just compensation for the loss actually sustained by them.

Defendants are therefore awarded the sum of \$1,745.00 with interest thereon at 7% per annum from October 17, 1939, until said award is paid.

Findings of fact, conclusions of law and judgment shall be prepared and submitted by counsel for the plaintiff and counsel for the defendants shall have five days thereafter within which to propose counter findings.

Dated: March 6, 1944.

MARTIN I. WELSH,

United States District Judge.

[Endorsed]: Filed March 6, 1944. [68]

In the Northern Division of the United States
District Court for the Northern District of
California.

No. 4158-R

UNITED STATES OF AMERICA,
Plaintiff,

vs.

40.34 Acres of land in the Counties of Placer and
El Dorado, State of California, Central Pacific
Railway Company, a corporation, et al,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

The above entitled action came on for trial on the 16th day of November, 1943, before the above entitled Court, plaintiff being represented by Frank J. Hennessy, United States Attorney, R. B. McMillan, Assistant United States Attorney, M. Mitchell Bourquin, Special Assistant to the Attorney General, Francis N. Foley, Special Attorney, and Thomas W. Martin, Special Attorney; and defendants F. M. O'Connor, Stella O'Connor, his wife, R. J. Miedel, R. B. Somerby, and W. H. Morrison being represented by Francis T. Cornish; and evidence both oral and documentary having been introduced, and the case being submitted, the Court finds,

I.

That the Complaint herein was filed on the 13th day of October, 1939, to condemn a right, power and privilege of uninterrupted use and occupancy of said land hereinafter described, [69] for a period of Two (2) years from and after the time of the granting and entry of the Order by this Court, granting to the United States of America immediate possession of said land for the purpose of, and with the right, power, and privilege of, during said period of two years, taking and removing concrete aggregates such as sand and gravel and other materials commonly known as concrete aggregates therefrom and from out said land in such quantity and quantities and in such manner as may be found by the plaintiff expedient, necessary and proper in the carrying out of the construction of the Ruck-a-Chucky Dam and Reservoir project, and with the right and for the purpose of exercising such other rights in and to said land, during said period of two years, as may be incidental to the construction of said Ruck-a-Chucky Dam and Reservoir, and that in the process of the removal of said materials from and out of said land for purposes and uses as aforesaid, provision for recovery of the gold contents of such material to be made upon terms, conditions, and in manner as set forth in Paragraph IV of the Complaint herein, commencing at line 25, page 4, and ending at the word "defendants" in line 15, page 4b, such right, power, and privilege of use and occupancy of said land and the removal of concrete aggregates from and out

of said land to be uninterrupted during said period of two years, free from any right or claim of any defendants herein to at all interfere with or interrupt such use and occupancy by the United States of America, and all thereof for the purposes aforesaid.

II.

That the use for which the hereinafter described property was sought to be taken and condemned by the plaintiff was one authorized by law, and that said property and the taking thereof were necessary and suited to said use.

III.

That all parties interested directly or indirectly in said property have been personally served with process, or have appeared in said action, and that said property, together with [70] all claimants and parties interested therein, are within the jurisdiction of this Court, which has power and authority to enter this Preliminary Judgment.

IV.

That service has been duly made upon the following defendants: Grace B. Maither, Grace B. Maither, as Administratrix of the Estate of A. F. Maither, deceased, Margaret V. McDonald, Mary E. Fowler, James G. Maither, D. B. Richards, as Trustee, Charles Bone, Hedwig B. Engle, W. J. Girard, Carl Von Der Nehden, A. B. Wheeler, F. M. Dunn, W. D. Pennycock, W. D. Stevens, B. J. Corrigan, Georgia Maither, Ada L. Threlkeld, Fred I.

Green, also known as F. I. Green, M. L. Cummings, H. A. McKinstry, J. A. Ware, F. J. Foster, J. G. Maither, Susie M. Maither, George Z. Johnson, John W. Killinger, C. W. Fletcher, The El Dorado and Placer Counties Mining and Power Company, a corporation, and American River Gold Mining Company, a corporation.

That the default of said defendants has been duly entered by this Court for failure to appear and answer, and the Court finds that said defendants have no interest in the property subject of this action or the compensation to be awarded therefor.

V.

That defendants Central Pacific Railway Company, Southern Pacific Land Company, Irene Gannett, and Jack Ward have filed Disclaimers herein, and the Court finds that said defendants have no interest in the property subject of this action, or the compensation to be awarded therefor.

VI.

That defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel were the owners of a valid mining location covering said land at the time of the filing of this action; that on the 6th day of September, 1940, defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel acquired title to said land by patent issued on mineral entry numbered 031856, from the United States of America. [71]

That said defendants are the only persons, firms

or corporations entitled to receive the compensation for the use and occupancy of said land by plaintiff, and no other persons have any interest in said land or the compensation to be awarded for the use and occupancy of said land by plaintiff.

VII.

That plaintiff entered into possession of said land on the 17th day of October, 1939; that plaintiff abandoned the land subject of this action on September 13, 1941, and the land was returned to defendants at said time in the same condition as when entered upon by plaintiff.

VIII.

That plaintiff took no gravel or sand or other material from the land during the period from October 17, 1939 until September 13, 1941, or exercised any rights other than that to use and occupy the land, and there was no consequent diminution in the value of said land.

IX.

That defendants have suffered no pecuniary loss over and above the use and occupancy of the land for the period from October 17, 1939 until September 13, 1941. [72]

X.

That no market value has been established for any of the rights originally sought to be taken and condemned in said land by plaintiff, as property separate and apart from the land itself.

XI.

That the sum of One Thousand Seven Hundred Forty-five and no/100 Dollars (\$1,745.00) with interest at the rate of seven per cent from October 17, 1939 until paid, is full, adequate and just compensation for the estate and interest in the land taken herein by plaintiff.

XII.

That the land subject of this action is situate in the Counties of Placer and El Dorado, State of California, and is more particularly described as follows:

The $E\frac{1}{2}$ of the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of Section 23, Township 13 North, Range 9 East, Mount Diablo Base and Meridian, delineated and bounded as follows:

Beginning at a point marking the southeast corner of the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 23, T. 13 N. R. 9 E., M. D. B. & M., said point bearing S. $89^{\circ} 55'$ W and distant 1,345 feet, more or less, from the corner common to Sections 23, 24, 25 and 26, T. 13 N. R. 9 E., M. D. B. & M., and running thence along the line between Sections 23 and 26 of the aforesaid township and range, S. $89^{\circ} 55'$ W., 672.8 feet, more or less, to the southwest corner of the $SE\frac{1}{4}$ of the $SW\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23; thence along the north and south line on the west side of the $E\frac{1}{2}$ of the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of said Section 23, N. $2^{\circ} 14'$ W., 2,667.2 feet, more or less, to the northwest corner of the $NE\frac{1}{4}$ of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23; thence

along the east and west one-half section line of said Section 23, N. $89^{\circ} 10'$ E., 643.3 feet, more or less, to the northeast corner of the $NE\frac{1}{4}$ of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of said Section 23; thence along the north and south line on the east side of the $E\frac{1}{2}$ of the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of said Section 23, S. $2^{\circ} 52'$ E., 2,677.00 feet, more or less, to the point of beginning; and containing 40.34 acres, more or less.

All of the above bearings are referred to the true north meridian.

Wherefore, It Is Ordered, Adjudged and Decreed that the sum of One Thousand Seven Hundred Forty-five and no/100 Dollars (\$1,745.00) with interest at the rate of seven per cent from October 17, 1939 until paid, be and it is hereby awarded to defendants F. M. O'Connor, Stella O'Connor, his wife, and R. J. Miedel, as full, adequate and just compensation [73] for the estate and interest in said land taken by plaintiff, and all damages resulting therefrom.

Done in open Court, this 24th day of August, 1944.

MARTIN I. WELSH

Judge, United States District Court, Northern
District of California.

[Endorsed]: Filed Aug. 24, 1944. [74]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 24, 1944.

FRANCIS T. CORNISH

Attorney for Appellants F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel,
2140 Shattuck Avenue, Berkeley 4, California

[Endorsed]: Filed Nov. 22, 1944. [75]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 216 pages, numbered from 1 to 216, inclusive contain a full, true and correct transcript of certain records and proceedings in the case of United States of America vs. 40.34 acres of Land, et al., No. 4158, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designation of Contents of Record on Appeal and Counter-designation of Record on Appeal, copies of which are embodied herein.

I further certify that the cost of preparing and

certifying the foregoing record on appeal is the sum of Ninety-one and 55/100 (\$91.55) Dollars, and that the same has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 11th day of September, A. D. 1945.

[Seal] C. W. CALBREATH,
Clerk

By F. M. LAMPERT
Deputy Clerk [217]

In the Northern Division of the United States District Court for the Northern District of California

Before: Hon Martin I. Welsh, Judge.

No. 4158

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40.34 ACRES OF LAND IN THE COUNTIES
OF PLACER AND EL DORADO, STATE
OF CALIFORNIA, et al.

Defendants.

REPORTER'S TRANSCRIPT

Appearances

For the Defendants: F. M. O'Connor, Stella O'Connor, his wife, R. J. Miedel, R. B. Somerby, W. H. Morrison, W. F. Fisher, Jack Ward and Irene Brinton, sued herein as Irene Gannett. Francis T. Cornish, Esq., American Trust Building, Berkeley, California.

For the Government: R. B. McMillan, Esq., Assistant U. S. Attorney; [1*] Francis Foley Esq., and Thomas W. Martin, Esq., Special Attorneys, Department of Justice. [1a]

*Page numbering appearing at top of page of original Reporter's Transcript.

Tuesday, November 16, 1943

10:00 o'clock a. m.

The Clerk: United States versus 40.34¹/₂ acres of land.

Mr. McMillan: Ready for the Government, your Honor.

Mr. Cornish: Ready for the defendant, your Honor.

Mr. McMillan: In that matter, may it please your Honor, the complaint was filed on behalf of the United States by Frank J. Hennessy, United States Attorney, and Mr. Gus B. Hjelm, Assistant United States Attorney. As your Honor is aware, Mr. Hjelm is no longer connected with the Government. He has been appointed to the Superior Court of the State of California, in and for the County of Stanislaus.

At this time, may it please your Honor, I wish to associate as attorneys for the Government in this case, Mr. Francis Foley, Special Attorney, and Mr. Thomas W. Martin, Special Attorney, and I have been appearing as attorney in this matter, also—R. B. McMillan, Assistant United States Attorney.

The Court: So ordered.

Mr. McMillan: Now, this is a condemnation proceeding. I suppose at the outset your Honor desire that we make our preliminary proof as to the nature of the project and the proposed improvements to be made, in keeping with the Court's practice in these matters, and if that is the order of the Court we will put on that preliminary proof.

The Court: So ordered.

Mr. McMillan: Mr. Goodall.

GEORGE E. GOODALL,

Called for the Government; sworn.

The Court: Do the defendants waive trial by jury? [3]

Mr. Cornish: Yes, your Honor. This was set at our request, and we waived a trial by jury at the time it was set.

Mr. McMillan: That is correct, may it please the Court. Both sides have waived trial by jury.

Direct Examination

Mr. McMillan: Q. Your name is Mr. George E. Goodall, is that correct? A. That is correct.

Q. Now, what is your business or occupation, Mr. Goodall? A. Civil engineer.

Q. Connected with what department?

A. With the War Department of the United States.

Q. United States Engineers?

A. With the U. S. Engineer Office in Sacramento.

Q. And what is your particular capacity now with that office? A. Principal engineer.

Q. And how long have you been connected with that office? A. Ten years.

Q. And how long have you been located here in Sacramento? For the full 10 years?

(Testimony of George E. Goodall.)

A. I was absent from Sacramento for eight months on duty with the office of the Division Engineer in San Francisco, from July, 1925, until April, 1926.

Q. But since then you have been here continuously? A. That is right.

Q. Are you familiar with the project known as the Ruck-a-Chucky Dam Project?

A. I am.

Q. And that is situated where, the proposed damsite? A. It is on the—

Q. The proposed damsite.

A. I beg your pardon?

Q. The proposed damsite was to be located where?

A. On the Middle Fork of the American River, approximately a [4] mile and a half or mile and three-quarters above what is known as the Ponderosa Bridge.

Q. How far from the property here under consideration?

A. It is about a mile and three-quarters, approximately.

Q. North?

A. In a northeasterly direction.

Q. The Ruck-a-Chucky Project was authorized by Act of Congress about when, if you remember?

A. I believe it was in 1935.

Q. What date did you give?

A. I believe it was 1935. I may be incorrect in that.

(Testimony of George E. Goodall.)

Q. Well, it was the Act of August 30, 1935, was it not? A. That is correct.

Q. Authorized the Ruck-a-Chucky Project, and that was for the construction of a dam at that site?

A. That is right.

Q. What was the purpose of construction of this dam?

A. For the storage of debris from hydraulic mining.

Q. That is to say, you were to establish there, in connection with this dam, a reservoir that would impound soil, debris, tailings, and silt that would come in from hydraulic mining?

A. That is right.

Q. It was to further hydraulic mining, and also in furtherance of navigation?

A. That is correct.

Q. To prevent the result of hydraulic mining, that is, the soils, silt and debris, in the tributaries of the Sacramento River, from going into the Sacramento River, and thus impeding navigation, is that correct? A. That is correct.

Q. Who was the engineer in your office who estimated the cost of construction of this dam?

A. All of those estimates were prepared under my direction.

Q. Your supervision?

A. That is correct. [5]

Q. They were made about when?

A. About May, 1939.

Q. And in connection with the construction of

(Testimony of George E. Goodall.)

this dam state whether or not it was required to have any gravel concretes.

A. Sand and gravel were necessary to make the concrete of which the dam was to be constructed.

Q. Was it estimated, the quantity of gravel concrete required in the construction of that dam?

Mr. Cornish: Just a moment.

If the Court please, I object to that on the ground it is incompetent, irrelevant and immaterial. I refer your Honor to the complaint, and in the complaint it sets forth that the Government is condemning the right, for a period of two years, to take gravel from this property for use in the construction, or incidental to the construction of this project. Nowhere in the complaint is the amount of gravel which the Government thought, at the time, it might take, set forth, and in no wise in the complaint does the Government limit itself as to the amount that it would take from the property.

The witness has just testified that this project was authorized by Act of Congress in 1935. The plans were drawn and completed in 1939, four years after the Act of Congress authorizing the construction of this dam. Therefore, your Honor, there is no doubt but what the amount of gravel which could be taken under the right to condemn was at no time limited by the complaint or by Court order, but the Government, under the right which they derived by the Court's order for immediate possession, had the right to take up to the limit of the gravel in this bar, and had the right limited

(Testimony of George E. Goodall.)

only by the amount of gravel that engineers could remove from this bar within a period of two years. Therefore, your Honor, it makes [6] no difference, as this right has been condemned, that the Government intended to take 100,000 yards, 200,000 yards, or 25 yards. Had they desired to protect themselves they should have, in the complaint in some way, set forth the maximum amount of gravel which they would take.

Now, it is our contention, your Honor, that the Government has, by taking an incorporeal right, not anything physical or anything tangible, but the right to remove gravel for a period of two years, for purposes incidental to or in the construction of the Ruck-a-Chucky Dam, where the plans were not crystallized, where there was no way of ascertaining at the time that right was taken—that is, at the time the Government took possession of this property—no way of limiting the amount of gravel that they could have taken; that the amount they might have taken is incompetent, irrelevant and immaterial.

As the Government has condemned this, they have condemned the right to take any amount of gravel that they might elect to take any time they changed their plans.

Now, your Honor has before you the determination of what was the value of that right at the time that the Government took possession.

In other words, to make it a little more concrete, your Honor: Suppose your Honor is the owner of

(Testimony of George E. Goodall.)

this furniture in the courtroom, and I came to your Honor and I say, "I would like to have the right to take as much of that furniture from this courtroom as I want to take in a period of two weeks. How much will you charge me for that right?" That is precisely what the Government has condemned,—the right to take whatever amount of gravel they saw fit for this project, however they may maintain it, for a period of two years. [7]

Your Honor may say to me, "Well, how much of this furniture are you going to take?"

I would say, "I don't care to be limited as to the amount I will take. I may change my plans. I may want one chair, I may want a desk, I may want two chairs and one desk; but I want you to fix the cash price at which you will give me the right to take and keep as much of this furniture as I see fit to take in two weeks."

Your Honor could put but one price, namely, the value of this furniture, for it would be possible for me, under that right, to take away all of this furniture in this room.

So under this complaint, had we gone into court the day following the taking of possession, and had the Government put on this testimony, let us say, that they intended to take a hundred thousand yards of gravel, then the Court could say, "Well, gravel is worth 10 cents a yard; a hundred thousand yards, that is a matter of mathematical calculation, \$10,000," and give the defendants \$10,000 for that gravel right. And then six months later

(Testimony of George E. Goodall.)

the Government decides, "Well, we have to maintain this dam. This dam is a 20-year project. It is going to pay for itself in the storage of tailings over a 20-year period. We want access to that. We are going to pave the road out from Auburn to there so we can get men and supplies over that to maintain the dam."

If they came in within a period of 20 years they would have the right to take all the gravel they required for the paving of that road, whether they paved it with three inches of gravel or four inches of gravel, or used it for concrete paving.

I submit whatever they planned to do or thought they would [8] take at that time is immaterial for the Court to consider in determining the value on the date that the Government went into possession of the right to take as much gravel as they saw fit to take.

Mr. McMillan: May it please your Honor, I will answer in full the statement made by counsel, in my opening statement, when I reach that in this matter.

He gave us the example that if he had the right to take all the chairs in this courtroom for use for some purpose. Suppose he wanted those chairs to furnish a little room across the hallway; Necessarily he wouldn't take all the chairs.

In this case, we didn't take any chair. The point here is this: that under the complaint it is alleged that we have taken an easement for two years, and that is in connection with the construction of Ruck-

(Testimony of George E. Goodall.)

a-Chucky Dam, and in that connection we have the right to take gravel and sand for use in concrete aggregates for the Ruck-a-Chucky Dam. Now, necessarily the gravel that we would take, and the sand for concrete, plainly, under the terms of the allegations of the complaint, would be for use in the construction of the Ruck-a-Chucky Dam, and we also took the use and occupancy of the premises for two years' time, but for no other use besides taking gravel in connection with the construction of this Ruck-a-Chucky Dam.

Now, if this estimate was made, it is a matter which your Honor has before you in allowing just compensation in a condemnation suit. There is no yardstick, there is no peculiar formula. Your Honor went all through that in the Miller case, which was before the Supreme Court, the Supreme Court affirming your Honor on all points.

We are here seeking, in a preliminary way, to show your [9] Honor the estimate that was made before the filing of this complaint, of the amount required of concrete aggregates to be used in the construction of the Ruck-a-Chucky Dam. That is why this suit was filed. We didn't need any more than is necessary to construct the dam. This is the gentleman who had in charge the making of the estimates of the cost of constructing that dam, and I am advising your Honor, in a preliminary way, of what estimate was made for the gravel and sand, the cubic yards required in the construction of the Ruck-a-Chucky Dam, and I submit it is per-

(Testimony of George E. Goodall.)

fectly proper at this time, and I submit it without further argument.

Mr. Cornish: May I ask, your Honor, frankly I have never been able to find out exactly what this Ruck-a-Chucky Dam calls for. I do know this, your Honor—and our testimony will show: that after this landslide occurred at the site of this dam in February, 1940, the Government held onto this property for a year and a half, notwithstanding that the defendants asked for permission to go in and mine that property—

Mr. McMillan: Now, may it please the Court, I don't want to interrupt counsel—

Mr. Cornish: May I finish, please?

Notwithstanding, your Honor, that we asked for permission to use a part of that property, one side of the river, or a part of the other side, the Government took the position that no matter where they moved that dam, no matter where they built it, or how big it was, it was still the same project, and they had acquired certain rights under this condemnation proceeding, and they were going to hold onto those rights and enjoy those rights, no matter where they built the dam.

Now, those facts will be developed in the testimony. A [10] year and a half after this rock slide and the site was buried, the Government held onto the property and denied the defendants permission to go on the property and use it, maintaining that under this condemnation suit they had that right.

Now, your Honor, I didn't draw this complaint;

(Testimony of George E. Goodall.)

I had no part in drawing the complaint. Although, in fact, we had discussed the matter in Mr. Hjelm's office several times before the complaint was drawn, and although we had reached a tentative agreement, the complaint was not drawn in accordance with our suggestions, as set forth in our answer, and as soon as we filed our answer we set forth each and every issue involved in this case, and put the Government on notice immediately as to just what we contended.

If the testimony is going to be, your Honor, that this project called for a certain number of yards of concrete, it would have been the simplest thing in the world for the Government to have said that they were condemning the right to take gravel from this property not to exceed a hundred thousand yards, or if they felt they might change their plans, add a little more to be safe, not to exceed 150,000 yards. But they didn't do that.

Paragraph 3 of the complaint sets forth (reading):

“The said Acts of Congress as set forth in the paragraph last aforesaid, together with said Rivers and Harbors Committee Document No. 50, authorize the Secretary of War to acquire by purchase and condemnation any estate, right, title, and/or interest in and to the real property hereinafter described not now held, owned, and/or possessed by the United States of America, for the purpose of for a period of two [11] years from and after the time of the granting and entry of an order by

(Testimony of George E. Goodall.)

this Court granting to the United States of America immediate possession of said land, removing concrete aggregates therefrom, and from out the same, and for the purpose of exercising such other rights therein and thereto as may be incidental to the construction of the Ruck-a-Chucky Dam and Reservoir on the Middle Fork of the American River, in the Northern Division of the Northern District of California, all of which is in furtherance of the construction and maintenance of the Ruck-a-Chucky Dam and Reservoir on the Middle Fork of the American River, in the Northern Division of the Northern District of California, of which said Ruck-a-Chucky Dam and Reservoir is a project, among others, of preventing the flow of debris resulting from hydraulic mining in and upon and natural erosion which may accumulate from, the watershed of the said Middle Fork of the American River at or above, the place on said river where said Ruck-a-Chucky Dam and Reservoir is being constructed, down the course of said river, and thence down the American River into the Sacramento River, and preventing such debris and accumulations from such erosion from obstructing, impeding and interfering with navigation in the navigable portions of the said rivers.”

Then follows, your Honor, Paragraph 4, in which they state the specific rights that they are condemning (reading):

“That in the prosecution of the project for the control of debris in the Sacramento River and its

(Testimony of George E. Goodall.)

tributaries in the State of California, authorized [12] by the River and Harbor Act of August 30, 1935, the Secretary of War is preparing to construct the Ruck-a-Chucky Dam and Reservoir on the said Middle Fork of the American River"—without limitation, your Honor, as to where it will be, but just to construct the dam on said river—(continuing reading):

—“and for the purpose of carrying out said project of constructing said Ruck-a-Chucky Dam and Reservoir, the Secretary of War has selected for acquisition by the United States of America, a right of uninterrupted use and occupancy of the land hereinafter described, for a period of two years from and after the time of the granting and entry of an order by this Court granting to the United States of America immediate possession of said land, for the purpose of, during said period of two years, removing concrete aggregates such as sand and gravel and other materials commonly known as concrete aggregates therefrom and from out said land in such quantity and quantities and in such manner as may be found to be expedient and proper in the carrying out of said project, and for the purpose of exercising such other rights therein and thereto during said period of two years as may be incidental to the construction and maintenance of said Ruck-a-Chucky Dam and Reservoir.”

Now, may it please your Honor, that is the specific right that has been condemned. The ex-

(Testimony of George E. Goodall.)

perts will differ in this case, your Honor, as to whether there are 750,000 yards—

Mr. McMillan: May I interrupt, your Honor?

Is counsel making his opening statement in this case as to what he expects to prove, or is he making an objection? [13]

Mr. Cornish: I am arguing an objection.

The Court: I suggest if you have an objection to make, make it, and let the Court rule on it; otherwise we will be here interminably.

Mr. McMillan: I wanted to interrupt to say that there are so many things that counsel has stated that are not the facts—

The Court: The objection is overruled. Proceed.

Mr. McMillan: Q. Will you state, Mr. Goodall, what was the estimate made, and when it was made, as to the quantity, the amount of concrete aggregates that would be required in the building of the Ruck-a-Chucky Dam?

A. It was estimated in May, 1935, that approximately 75,000 yards of concrete aggregates would be necessary in the construction of the Ruck-a-Chucky Dam.

Q. And you were the engineer who had charge of figuring the cost of construction?

A. That is right.

Q. And that was the amount figured, 75,000 cubic yards, approximately?

A. That is right.

(Testimony of George E. Goodall.)

Q. In the construction of that dam. Now, let me ask you, do you know whether or not any gravel was taken?

Mr. Cornish: Objected to, if the Court please, as incompetent, irrelevant and immaterial.

The Court: The objection is overruled. Proceed.

Mr. McMillan: Q. Whether or not any gravel whatever was taken in the furtherance of this suit in the construction of the Ruck-a-Chucky Dam?

A. There was none.

Q. None whatever? A. That is right.

Q. For your information, the complaint in this action was filed on October 10, 1939, and the order of possession was made on that date. It appears that although we claim only technically—— [14]

And I submit that the proof, may it please your Honor, will show this before we conclude——

——that the plaintiff entered into possession on or about October 17, or 18, 1939. Did the plaintiff ever construct the Ruck-a-Chucky Dam?

A. No.

Q. What came to pass to prevent that, Mr. Goodall?

A. On February 28, 1940, a large amount of earth and rock slid down over the proposed dam-site and covered up the stream bed portion to such depth as, first of all, to render the construction of the dam uneconomical, and, secondly, large masses of rock were still hanging in the debris on the left abutment area that would have had to have been

(Testimony of George E. Goodall.)

removed to prevent their sliding down, rolling against the dam, and thus injuring the dam.

Q. Did the War Department engineers then determine to abandon the particular site for the reasons which you have given?

A. The War Department did.

Q. Immediately, or was some time required?

A. It was some time afterwards.

Q. What was done in connection with that?

A. Considerable exploratory work was done. The original exploratory tunnels on the left abutment were buried by this material that had slid down from the left abutment, and we have the contractor's power shovel excavating material from the upper tunnel, exploratory tunnel, on the left abutment, to determine what had happened in that locality.

Q. That requires much time? How much time?

A. It was along in May—I forget the exact date—in May of 1940, that the portal of that exploratory tunnel was uncovered.

Q. Was it afterwards determined by the War Department that it [15] would be necessary to select another site? A. It was.

Q. And did you figure on selecting a site near there downstream or upstream?

A. At first we explored a site downstream, about a mile downstream from the original site, and we spent some months in diamond-drilling and tunneling in that area, and it was found that while apparently good rock was noted on the surface, and

(Testimony of George E. Goodall.)

easy following down to considerable depth, that mud seams persisted and existed to such depth as to make it of doubtful security to build a dam of that size and type at that location, so that further exploratory work was then continued upstream from the site at which the last slide occurred, and four sites in that locality were mapped and preliminary geological explorations made to determine the most feasible locality.

Q. And was a determination made?

A. Yes.

Q. About when?

A. About November, 1940, or December, 1940.

Q. November, 1940? A. That is right.

Q. Did you ever go ahead with that site?

A. No, we didn't.

Q. Do you know the reasons and can give them?

A. Well, we have been concentrating practically all our energies since that time on defense work and war work, and there was no money available for the construction of a debris dam.

Q. That was not a power plant?

A. It was—there was to have been no hydro-electric power in connection with the Ruck-a-Chucky Dam.

Q. And further appropriations were withheld unless the plants that were under construction had some phase of furnishing or generating power, is that correct?

A. Well, I cannot say as to that. I am not familiar with the policy as set forth in Washington.

(Testimony of George E. Goodall.)

Q. In considering the site that you had in mind, the second site, had that been selected you would have still had need for the gravel that is described in this complaint and in your testimony?

A. That site downstream, that is correct; we had proposed to build an arch concrete dam at that site. In that case we would have needed the concrete aggregates to construct that dam.

Q. So it then remained your intention while exploring the second site, that upon its selection you would still have taken gravel from this property under consideration? A. That is correct.

Q. Now, after it was finally determined that the second site was not satisfactory, and you were selecting the third site to which you have referred, up the river—how far up the river was that from the original site of the Ruck-a-Chucky Dam?

A. It was about four or five miles.

Q. State whether or not it was determined then that you would no longer have any use of the gravel here under consideration, the concrete aggregates, upon the selection of the third site.

A. It was proposed to construct a rock fill dam at that upper site. Some concrete aggregates would have been necessary in connection with the face and slab to render the rock fill watertight, and for the construction of the spillway, but the exact quantity was never determined, inasmuch, as I say, we proceeded with defense work and war work very largely from that time on.

(Testimony of George E. Goodall.)

Q. But it was clearly determined, was it not, that you had no further use for the gravel to be taken from the property we have here under consideration? A. That is correct.

Q. It was absolutely not feasible, and furthermore it was a different type of dam, so far as material was concerned, to be [17] constructed?

A. That is correct. And there were deposits of gravel in the stream bed of sufficient quantity for the much smaller amount of concrete that would be necessary in the construction of the concrete face and slab and the spillway works at the proposed rock fill dam.

Q. Did your department then proceed to advise the War Department that you no longer had use for the gravel, and desired to abandon these proceedings and to so notify the Attorney General of the United States to take appropriate steps?

A. I cannot state definitely as to the notification of the Attorney General. The office of the Chief of Engineers was advised that we had tentatively chosen this upper site approximately four miles upstream.

Q. Well, was it your understanding at that time that the Government had never entered into possession of this property at all?

A. That is true.

Q. Do you know whether it had entered into possession of the property?

A. It was my understanding that some power

(Testimony of George E. Goodall.)

poles were constructed, or set in that property, but none of the aggregates had been removed.

Q. Before the completion of the power project and the time to take the gravel had arrived, this landslide took place? A. That is correct.

Q. You don't know whether or not that you sought through your department and through the Attorney General to abandon this property?

A. I don't know that of my own knowledge.

Mr. McMillan: I will give you a copy of this map, Mr. Cornish, for your own convenience. You may keep that copy (handing document to Mr. Cornish).

And I have another copy of this map. It is entitled [18] "Vicinity Map," and I will give that to the Clerk, and the Clerk may, for the convenience of the Court, have it at hand (handing document to the Clerk).

Q. I will show you, Mr. Goodall, what purports to be a vicinity map, location map, location of proposed dam, Sacramento River and tributaries, Sacramento debris control, Ruck-a-Chucky Dam, Middle Fork of the American River. Is this an official map of your department? A. It is.

Q. Was it prepared under your direction and supervision? A. That is correct.

Q. Is it a true representation of the conditions—especially the physical conditions that it undertakes to portray? A. That is right.

Mr. Cornish: Mr. McMillan, before you offer

(Testimony of George E. Goodall.)

that map, may I ask the witness a couple of questions concerning it?

Mr. McMillan: I have no objection if your Honor has none.

Mr. Cornish: Q. I refer, Mr. Goodall, to the west bank of the American River, as it appears on the east half of the west half of the southeast quarter. Do you see the portion to which I refer, about the center and top of the sheet?

A. Yes.

Q. You notice that a gravel bar is shown there on the inside of the bend; there is also a gravel bar shown as an island; and there is also a gravel bar shown down below.

A. That is correct.

Q. Are those three gravel bars in the east half of the west half of the southeast quarter?

A. I didn't get your question.

Q. Do those three gravel bars actually appear on that portion of the east half of the west half of the southeast quarter, Section 23?

A. Not in their entirety. The major portions of them.

Q. You say this map was prepared under your direction? [19]

A. That is correct.

Q. Is it not true that the west bank of the river, as it flows through that property, was not actually surveyed, but was only estimated?

A. I can't definitely answer that question as to the precise procedure of the field work.

Q. You don't know that?

(Testimony of George E. Goodall.)

A. No, I don't.

Q. You know, do you not, that the only bar, or the only deposit in which the Government was ever really interested, was that which is designated the Cherokee Bar?

A. That is correct.

Q. And you have no knowledge of your own of any survey being made of any portion of the east half of the west half of the southeast quarter of Section 23, other than that portion which is designated as Cherokee Bar?

A. Not as to the definite procedure of field work, no.

Q. I see. So far as you know, then, the west bank of that stream may or may not be accurately depicted on this map?

A. I might say that the location of those bars is subject to change after periods of high water.

Q. Do you know what the condition is of the west bank of that stream?

A. Right now? No, I don't.

Q. Do you know whether it is movable or fixed?

A. The bank would be fixed, but the bar would not necessarily be fixed.

Q. Do you know whether there is any bar along the west side of that river?

A. Not now. I haven't been up there for two years.

Q. As a matter of fact, the west bank of that stream, all the way along, is a steep hill, isn't it—it is not subject to moving?

(Testimony of George E. Goodall.)

A. The bank is not subject to moving, but the bar is. [20]

Q. And doesn't the main course of the stream run right next to that bank all the year around?

A. I don't know.

Mr. Cornish: You don't know. Very well.

Mr. McMillan: Have you any objection to this map being introduced in evidence? It is a vicinity map, as stated on the map itself, Mr. Cornish.

Mr. Cornish: Well, it is only this, Mr. McMillan: that we have had two surveys taken of that property, and they both indicate that the river is entirely on the east half of the west half of the southwest quarter, and on the Government's map they show a portion of the gravel bar being off the property, and I have been told that the Government, in making their survey, did not accurately survey that edge of the bank, but only surveyed the bar.

Mr. McMillan: Now, may it please your Honor, counsel is testifying again in this case.

The Court: Yes.

Mr. Cornish: No, your Honor, I have no intention to testify. I am merely stating the reason why I would object to it. Except in so far as it shows that bank, your Honor, I have no objection to it. If that bank is just sketched in, and it is not intended to show that a portion of the river runs off the property, I have no objection to it, but if it is intended to accurately depict both sides of the river as it courses through this property, I object on

(Testimony of George E. Goodall.)

the ground that there has not been any foundation laid, because this witness does not know, he has no knowledge as to whether any accurate measurements were taken. As I say, it has been surveyed once by ourselves and once by someone else who is disinterested, and once by the Government, and almost every survey you look at gives you different lines. If this has been [21] accurately surveyed, I have no objection, but if it has been sketched in, then I do object.

Mr. McMillan: May it please your Honor, we will offer it subject to any objection that may develop in the course of the trial as to its correctness. I had merely in mind this being preliminary proof directed to the Court's attention of the nature of the project and the proposed improvements, to give your Honor a general picture of the project there—and, as indicated by the map, it is a vicinity map—and have the witness point out to your Honor the project here under consideration, because I have no doubt that your Honor would want to go out and view the premises, and I thought at this time that could be introduced in evidence subject to any corrections hereafter to be made as developed by the proof.

The Court: Admitted.

Mr. McMillan: I ask it be admitted in evidence and marked as Government's Exhibit 1.

(The "Vicinity Map" referred to was received in evidence and marked U. S. Exhibit No. 1.)

(Testimony of George E. Goodall.)

Mr. McMillan: Q. Now, Mr. Goodall, will you please do this—you are an engineer, and you certainly should be able to describe the things better than I can—I want you to give information to his Honor as to the location of the property here under consideration, and the elevation of the Middle Fork of the River there, and the location of the Ruck-a-Chucky proposed project. Just explain that in your own way, all physical conditions as portrayed by that map.

Now, with respect to the location on that map of Ruck-a-Chucky proposed dam.

A. The proposed Ruck-a-Chucky dam is located here (indicating). [22]

Q. Where is the property that we have here under consideration?

A. The property under consideration is outlined by this heavy line in this rectangle here (indicating).

Q. In what portion is that from the proposed dams site?

A. It is practically west, a little north of westerly from the dam.

Q. What is that river I see running here?

A. This is the Middle Fork of the American River (indicating).

Q. And running in what direction?

A. It is running a little north of west. West being about in this direction (indicating), and north (indicating). It runs a little north of west.

Q. There are no contours depicted on that map?

(Testimony of George E. Goodall.)

A. No, there are not.

Mr. McMillan: I think that is all, Mr. Goodall.
You may cross-examine.

Cross-Examination

Mr. Cornish: Q. Mr. Goodall, you considered —your office considered that wherever that dam was built on this river, it was still the same project, did you not? A. We did.

Q. And it was your intention at all times while you were looking for another site, to use as much of these concrete aggregates as you might see fit to use for the construction of any dam, wherever it might be on this river?

A. That would depend on where the dam was built, and the type of dam finally chosen in an alternate site.

Q. Let me put it this way: that it was your intention, when you looked at and examined the site downstream from the original site, to use this gravel if you built a concrete arch there?

A. That is correct.

Q. And it was your intention, if you selected a site where this [23] gravel is more available than any other gravel, and you required any concrete aggregates, to use this gravel, was it not?

Mr. McMillan: May it please your Honor, I think that is purely speculative and remote, as to the quantity of gravel that might be required in another site. In giving your Honor a history of the project, necessarily it was to advise the Court of

(Testimony of George E. Goodall.)

the delay that was taken in this matter. Counsel is seeking to show by this witness that if we selected another site, why, we might have used more than 75,000 cubic yards of gravel. It is purely speculative. It just happens that we didn't select the second site, and it further happens that at the site selected, which was the third site, that there was no necessity for gravel. So I submit it is conjectural and going into a speculative realm. This property was condemned for the Ruck-a-Chucky Dam described in this complaint. Now, if some other site were selected that required the use of the gravel, that is another thing, but it didn't happen. This is unique. No gravel was taken——

The Court: Any objection?

Mr. McMillan: I offer that objection, on the ground it is too speculative and remote.

The Court: The objection is sustained.

Mr. Cornish: Q. This site which you were examining, which was, you say, downstream—it was downstream from the original Ruck-a-Chucky site?

A. That is correct.

Q. And can you point out with this indicator just where on the map that site was?

A. Well, it would be very difficult to point it out exactly, because the topographical features are omitted from this map, and there is nothing to identify the exact location, except that we know that it was above this 12 by 14 foot bridge, and it would be somewhere approximately in here [24] (indicating on map).

(Testimony of George E. Goodall.)

Q. Somewhere in the vicinity of where this pale light line crosses across the stream?

A. Generally speaking. I wouldn't identify it as being exactly at that point.

Q. But thereabouts? A. That is correct.

Q. And the other point, you say, was four miles upstream from the site of the proposed—the original Ruck-a-Chucky Dam?

A. Approximately, yes.

Q. Now, those investigations to determine the site were made pursuant to this same Act of Congress authorizing the construction of the Ruck-a-Chucky Dam, were they not? A. Yes.

Q. Are you able to tell at this time, had the second site been selected, the number of yards of concrete aggregates that would have been required for the construction of that dam?

Mr. McMillan: I object to that, may it please your Honor, on the ground it is purely speculative, too remote, and necessarily this engineer has made no mistake at all with reference to these later sites.

Q. You have made no estimates with reference to that, have you?

A. We made an estimate of the lower site.

Q. But it was never selected, as I understand?

A. No, because it cost too much money.

Mr. Cornish: May it please your Honor, may I again repeat what I said a few moments ago, that this whole thing is speculative? This is one project that was authorized by an Act of Congress of 1935, and it was left up to the War Department

(Testimony of George E. Goodall.)

Engineers to select the site and draw the plans, and as I pointed out to your Honor, the exact location, the exact site, the exact size, the exact construction, the total volume of concrete aggregates, and all that, was never determined, but no matter [25] where they moved this, they were still acting pursuant to the same Act of Congress, which is the Act, your Honor, set forth in the complaint, and which authorized the condemnation of this property, namely, this Rivers and Harbors Act of August 30, 1935.

Now, I interposed the objection to the witness testifying to the volume of concrete aggregates that were required—that he anticipated would be used in the original dam, because it was incompetent, irrelevant and immaterial in the manner in which it has been condemned. Then when we attempt to find what gravel would be used in the second site, counsel objects to that as speculative. I am merely trying to point out, your Honor, by this witness' testimony, that the Government has taken the position consistently throughout that regardless of the amount of gravel they needed, regardless of how that might change, whether it diminished to one yard or nothing, as it has, or whether it increased to double the capacity of the bar, they contended, and they were right in their contention, that as long as they were building a dam pursuant to that Act of Congress, as long as they were building that project, they had the right to take all the gravel.

Now, it was up to the Government, if they de-

(Testimony of George E. Goodall.)

sired to protect themselves, to limit the amount of gravel they could take, or give the defendants some protection, so that we could have gone into court on the day this was taken, and the Court could, at that time, fix a cash value on the amount of gravel that would be required for this project.

We are not interested, your Honor, in buying gravel on a royalty basis. We are interested in the cash value of the incorporeal right known in law as a profit, that the Government may condemn in this property, and we are interested in the value [26] of that profit at the time the Government went in possession. And, as I see it, your Honor, that is the only issue in the case, is how much gravel did the Government have a right to take under this complaint; and, secondly, what was the cash value of that right? Not the extent they thought they might enjoy it, but what was the value of that right at the time that the Government took possession of that right?

Now, that is my understanding, your Honor, of the rules on eminent domain, that where the Government takes possession, the value is fixed as the cash value, the reasonable market value at the time that it takes possession, and if we are correct in that assumption, your Honor, why, the question of damages to the defendants, as a result of being deprived of the use of their property—we are perfectly willing to waive any damages from that score—but we do feel that as the Government has condemned it, that there is a certain definite rule

(Testimony of George E. Goodall.)

for determining the value of that gravel, and the value of the right of taking that gravel in any amount they saw fit to take it in a period of two years.

The Court: The objection is overruled. Proceed.

Mr. Cornish: Q. Do you recall on what date your department determined that it would not take gravel from this bar?

A. Not the exact date, no.

Q. And do you recall how long a period of time elapsed between the time that your department decided that it would not take gravel from this bar and the time that the United States Attorney filed an abandonment of the rights taken under this proceeding?

A. No, those are not matters that I handle.

Q. What time was this upper site selected?

A. The third site? [27]

Q. Yes.

A. It was in the very end of the year 1940, as I remember.

Q. And do you recall just—I will withdraw that. Is that the site referred to in this Rivers and Harbors Document 50 as the Volcano Site?

A. No, it is not.

Q. And you are familiar with that Volcano Site, are you?

A. I visited it over nine years ago. I haven't seen it since.

Q. And where was this site that had finally been selected, with reference to the Volcano Site?

(Testimony of George E. Goodall.)

A. It was considerably downstream. It was somewhat below the mouth of Otter Creek.

Q. Below the mouth of Otter Creek?

A. That is correct.

Q. And it was the intention of your department to construct that dam pursuant to this same Act of Congress of August 30, 1935?

A. That is right.

Mr. Cornish: I have no further questions, your Honor.

Redirect Examination

Mr. McMillan: Q. Mr. Goodall, if you selected another site, and it cost much more to build, the later selection, in view of the fact that this damsite was being constructed in aid of hydraulic mining, the miners would have to be consulted, would they not, as to this additional cost of the dam before you could proceed?

Mr. Cornish: To which we object, your Honor, on the ground it is incompetent, irrelevant and immaterial; highly speculative; and calling for an opinion and conclusion of the witness.

Mr. McMillan: I think it is a matter that the law itself takes care of, may it please your Honor.

I have no further questions.

The Court: The objection is overruled. You may answer.

A. It was considered that in view of the way the law was framed [28] in regard to hydraulic mining, that inasmuch as the hydraulic miner has

(Testimony of George E. Goodall.)

to repay the cost of the dam by a tax on each yard mined in the pit, that the costs were excessive for the hydraulic miner to pay, and that rather than being a benefit to hydraulic mining, if we built a dam that was too excessively expensive, it would act as a deterrent to hydraulic mining, and that it was necessary, in the interest of aiding the hydraulic miners, to find a site at which storage could be bought at a price the miners would be able to pay.

Mr. McMillan: Q. And they would have to practically guarantee the repayment of this cost, would they not?

A. The law requires that no work shall be undertaken—this is not verbatim—until assurances satisfactory to the Secretary of War have been received that the miners will pay, by this tax, the cost of the reservoir.

Mr. McMillan: That is all, Mr. Goodall.

Mr. Cornish: May I ask one question?

Recross Examination

Mr. Cornish: Q. From and after May of 1940, when you abandoned the site, the original Ruck-a-Chucky site, from and after that date you had no assurance from any hydraulic miners that they would rent any tailing space, did you?

A. Tailing space was not sold definitely as to the location, precise geographical location of the reservoir, as I recall it, but rather, that they would

(Testimony of George E. Goodall.)

store their tailings in a reservoir to be constructed on the particular stream in question.

Q. And the price that they were to pay for that storage depended upon the cost of the dam, didn't it?

A. That is correct.

Q. All right. Then from the time that you abandoned the Ruck-a-Chucky site in May of 1940 you didn't know what a dam would cost, [29] did you?

A. No.

Q. And you didn't have any contracts with any miners from that time on for the storage of tailings behind any dam, did you?

A. Yes; the original contracts——

Q. I mean other than those original contracts.

A. We had those.

Q. All right. And did those contracts provide that the price for storage would change if the cost of the dam changed?

A. The price for storage was not set forth in the contracts at the time they were written, because at the time those contracts were written the dam had not yet been built, and nobody ever knows exactly, when they start to build a dam, how much it is going to cost by the time they get through, so it was impossible for the Government to set forth the precise rate of payment for storage in any reservoir.

Q. Then that matter was left open, and I take it was subject to the dam being put wherever the Government might see fit to put it?

(Testimony of George E. Goodall.)

A. That is correct.

Mr. Cornish: That is all.

Mr. McMillan: That is all.

(Witness excused.)

Mr. McMillan: Now, may it please your Honor, that completes our preliminary showing. We concede at this time that counsel has the right to open and close.

The Court: We will take a ten-minute recess.
(Recess.)

The Court: You may proceed.

Mr. Cornish: Before starting my opening statement, may it please your Honor, Mr. McMillan and I discussed the matter of viewing the premises. We understand that your Honor may want to view the premises, and it is agreeable to both sides that your [30] Honor do so. It requires driving up from here to the property of approximately an hour and a half, and an hour and a half to return. If your Honor desires to view the premises, would you prefer to view them before we make our opening statement, or afterwards? Whichever is satisfactory to the Court is satisfactory to us.

The Court: Well, it makes no difference to the Court.

Mr. Cornish: It is just a question of time. I would probably spend the rest of the morning on an opening statement, and that would leave this afternoon, and the trip could not be made any more

than to get there and back between 2:00 and 5:00 this afternoon.

The Court: That would be satisfactory.

Mr. Cornish: That would be agreeable to your Honor?

The Court: Yes.

Mr. Cornish: Very well.

May I draw a rough sketch on the board for illustration?

The Court: You may.

(Whereupon Mr. Cornish drew a sketch on the blackboard.)

(Further discussion between the Court and counsel in regard to viewing the premises.)

Opening Statement on Behalf of the Defendants

Mr. Cornish: On that board, your Honor, is a rough drawing of the property. It measures 40 acres—40.34 the complaint states, but 40 acres more or less,—and approximately in proportion one by four. In other words, your Honor, from north to south it measures a half-mile, and from east to west an eighth of a mile.

The surveys which have been made by the Government and by our surveyors are substantially the same so far as the dimensions [31] of the property are concerned, the main difference being a variation of approximately a foot in the location of the base line, south line, and the Government survey tips the property a little more to the west, not over two degrees in compass variation. But the river, as it enters this property, the Middle Fork

of the American River, is flowing almost due west. It makes a bend on this property and flows first south, and then it bends slightly and flows to the southeast, and finally travels along the east boundary of the property. The river, your Honor, flows to the west, turns and flows south, then cuts across the bar going to the southeast, and as it reaches this point continues to flow due south, and in making this last bend, the east boundary of the property is in the middle of the river.

Along the west side of the property, almost at the edge, is a deep bank. It appears, as you look up the bank, a more than 45 per cent grade, a 45 degree angle. And on the east side of the property is a similar bank which rises almost as abruptly, and leaves a channel which is roughly 500 feet in width, through which the river courses. That channel is fairly narrow at the northern end of the property, as the river comes on, and it widens out, and it is roughly a trough 500 feet in width running from north to south on this property.

The bottom of that wide channel is almost entirely sand and gravel, and the river itself, as it courses through the property, rather than flowing on a solid bedrock, flows on a bed of gravel.

That gravel, the testers of it say, consists in part of the original gravel which was deposited there before the white men came to California, and in parts of—the top layer is hydraulic wash which has come down from the hydraulic workings up above this property, and the deposit of which was stopped by the Sawyer [32] case, and later has been

controlled by the Debris Commission. It is debris of this type which covered this property with what varied from nothing up to 12 feet in depth, that the construction of this dam sought to avoid.

On the inside of this bend, your Honor, (indicating on map) between the east bank and the river, is a fairly sizeable gravel bar. On the west side of the river, on the southern end, triangular in shape, is a second gravel bar. The gravel bar on the inside of the bend differs from that on the outside of the bend in that the gravel bar on the inside has, on the surface, a much higher sand content, and a much smaller boulder content.

Then in high water, your Honor, when the stream is between maximum flood stage and low water, there is a channel which is appreciably higher than the main bed of the stream, which I have designated as a high water channel, and some of the water takes, you might call it, a short-cut across the northwest corner of the bar where the main channel runs down as I have designated.

Your Honor will recall that when the United States offered this exhibit, that we questioned the witness concerning the exact course of the west bank of the river, for the reason that the surveys differ, and ordinarily the surveyor surveys only one bank, which appears to be usually the east bank, and then sketches in the west bank where he imagines it was, without paying particular attention to accuracy. But it is the contention of the defendants that at the time the river enters the property up at the northerly end, up until the time

it dissolves, you might say, the boundary at the southern end, that both banks of the river are on the defendants' property.

This property, your Honor, was taken as a mining claim in 1935, and was involved in some litigation, and finally, when that [33] litigation was completed, the parties decided that they would take out a United States Land Patent, and the property has since been patented by the United States Government to R. J. Miedel, one of the defendants, and to Fred O'Connor and Stella O'Connor, his wife, with the result, your Honor, that the title of the property is one-half interest in R. J. Miedel, and a one-half interest in F. M. O'Connor and Stella O'Connor, his wife.

They intended to mine this property out with a dredging process, but were informed that the Government was about to build the Ruck-a-Chucky Dam, and according to maps which were shown to them, this bar, which is the inside bar—called on the map Bar 1—was designated on that map with the words, "Only available sand and gravel."

Realizing that if they put mining machinery into the property, that condemnation proceedings could be instituted and there might be some delay and some damage to them as a result of being shut down, they approached the Government, explained to the War Department Engineers what they had, that they wanted to mine it, that they weren't in the gravel business, but realizing that the Government had to have the gravel, and the result was that negotiations continued for a period of about a

year and a half before this condemnation suit was started.

For the most part the Government somewhat discounted the defendants' claims that there was any gold in the property, but finally, after a number of discussions, the Government declared that it anticipated, but would not bind itself to it, anticipating using approximately 70 to 75 thousand yards—cubic yards of concrete aggregates, which they estimated would displace what they called 100,000 yards bank run. That would mean, your Honor, that in order to get 75,000 cubic yards of concrete aggregates [34] of the sizes desired, it would be necessary to displace 100,000 cubic yards, run that through a trommel, and size out that portion which was too large or unsuitable for concrete aggregates, and that wastage would have been approximately one-fourth of the gravel as it lay there on the property. So they would excavate 100,000 yards, throw away 25,000 yards, which was of inappropriate size, and retain 75,000 yards for use in the concrete aggregates.

The defendants contended that they preferred to mine the property, but since they realized that a condemnation suit was possible in order to get the gravel, and that they were more or less at the mercy of the Government for that purpose——

Mr. McMillan: Now, may it please your Honor, I take it counsel is making an opening statement of matters he expects to prove, and matters of realization and mercy I don't believe are altogether susceptible of proof.

Mr. Cornish: I meant that in a proper way, Mr. McMillan, that if the Government saw fit to condemn it, they could do it. In other words, we could do nothing about it. In other words, all the Government had to do was file suit, and we had to sell it at the amount the Court determined was the reasonable market value.

Mr. McMillan: What I had in mind is whether in your opening statement you are going to adhere strictly to what you expect to prove in this case, or whether it is an argument.

Mr. Cornish: Yes, sir, your Honor. I think it is a perfectly proper opening statement.

Mr. McMillan: I won't make any objection. You may proceed.

Mr. Cornish: Very well.

So, your Honor, as a result of those conferences the War Department Engineers agreed that in order to protect what the [35] defendants contended to be their gold interest, that certain safeguards would have to be put around the contractor who was going to work this gravel. The defendants sought to limit the Government and the Government's contractor in some way, either as to the area of the bar or of the property that would be worked, or as to the depth of the gravel that would be worked, because they felt that if they were afforded a portion of this property to mine while this gravel extraction process was going on, and they knew that the ground would not be disturbed below a certain level, that they would not be substantially damaged. It culminated in a tentative

agreement for the payment of a cash price, and in addition to that the defendants, doing certain things, your Honor, which are set forth on pages 4, 4-A and 4-B, of the complaint—the substance of those provisions is that the contractor would raise the gravel to a certain elevation; it varied, depending on the size of the gravel; the gravel would be made available to the defendants for recovery of the gold from the gravel by force of gravity. In other words, any lifting of that gravel that was necessary was to be done at the expense of the Government, so that as it went through the gold concentrating devices, or gold recovery devices, that it would be carried by force of gravity, without any lifting or mechanical means on the part of the defendants. In addition to that the Government tentatively agreed to furnish water in an amount not to exceed 2,100 gallons per minute, and power not to exceed 20 horsepower connected load.

The reason behind that, your Honor, was that to recover the gold in connection with a gravel process, required a stationary plant, whereas the defendants contemplated the construction and use of a portable plant. The stationary plant was not usable as [36] a portable plant, nor was the portable plant usable as a stationary plant.

So it was tentatively agreed that if the defendants constructed this portable—this stationary plant to use in connection with the gravel recovery and sizing process, that the Government would pay a cash consideration, would elevate the materials so they could be carried through the gold recovery

devices by force of gravity, furnish water up to 2,100 gallons a minute, and furnish electricity to the extent of 20 horsepower of connected load, which was felt, as a result of the conferences, would be adequate to take care of the defendants' rights. Then, your Honor, before the final confirmation of that plan by Washington, the contract had been let to the contractor who started work on the dam, and who desired immediate possession, and in order to gain immediate possession the defendants insisted upon a commitment from the Government as to whether this proposition that had been tentatively agreed would be acceptable, and denied the contractor permission until they had some definite word that their rights would be protected along the lines that they had discussed.

Consequently, the Government filed this condemnation suit and took immediate possession, and in its attempt to safeguard the rights of the defendants, set forth these various provisions that appear on pages 4, 4-A and 4-B, of the complaint. But fearing that the defendants might not avail themselves of that provision, the Government also condemned, in the alternative, as they set forth in page 4-B of the complaint, starting at line 7, your Honor (reading):

“In the event said owners, R. J. Miedel, F. A. O'Connor, and Stella O'Connor, shall fail or refuse [37] to carry out the requirements as above set forth, at the time required by the Chief of Engineers, United States Department of War, then and in that event the plaintiff shall have the option to

either take the said concrete aggregate without recovery of gold contents thereof, if any there be, or to carry out the requirements so failed or refused by the said defendants.”

In other words, your Honor, under this proceeding the Government, if the defendants fail to do so, had the right either to perform these things themselves, and give us the gold, or to take the whole thing without recovering the gold, and turn the whole body of gravel that they removed over to the contractor to treat as he saw fit.

Now, we set forth in our answer, your Honor, that these provisions which are set forth in the complaint are inadequate for the protection of the rights of the defendant for the reason, your Honor, that starting at line 3½ on page 4-B, appears this condition (reading):

“The owner to return all material, after the removal of gold and other precious minerals therefrom by force of gravity, at the same rate and of the same consistency as delivered to the gold recovery devices, with a loss of not more than five per cent.”

There is nowhere in those specifications that any limitation is placed upon the plaintiff, or upon the plaintiff's contractor, as to the rate at which the contractor would remove gravel from the bar.

In our preliminary negotiations with the Government it was mentioned that approximately 100 cubic yards of gravel an hour [38] would be removed.

It then developed, after the suit was filed, that the contractor was going to bring in a device

which would process 250 cubic yards of aggregates per hour, which meant that the gold recovery devices that had been contemplated by the defendants were entirely inadequate and could not cope with the load that might be turned upon them, and they were put in the position where they either had to anticipate the whim and will of the contractor who went in for the plaintiff, and be ready to take care of and recover their gold just as fast as it was thrown to them, or take the loss themselves. In other words, your Honor, if it became necessary to change the plant to $2\frac{1}{2}$ times its originally contemplated size, it became necessary to have $2\frac{1}{2}$ times the water, and the Government was only obligated to furnish 2,100 gallons of water per minute, and if it was necessary to change the plant to $2\frac{1}{2}$ times its original size, the electrical energy of not to exceed 20 horsepower connected load would no longer be adequate; they would require electrical energy of 50 horsepower of connected load.

So we set forth in our answer, your Honor, that these provisions did not protect us, and that it was impossible for the defendants to comply with these provisions.

Now, that is material in this respect: While there is no doubt that no gravel was ever taken by the Government, I return again to what I said before, that the Government did not condemn anything tangible, anything specific. They did not take so many yards of gravel from a certain place. They took the right to take gravel, which is an incorporeal right. It is like a right-of-way. It gives

no interest in the property itself; merely the right to use that property. They didn't limit themselves as to the amount that they would take.

Now, I have drawn this diagram, your Honor, and it will develop that approximately 30 acres of that 40 acres contains gold-bearing gravel, and that gravel extends, the defendants believe, under this bank and clear to the east edge (indicating on map). The defendants know, however, your Honor, that this cabin is 156 feet from the east edge of the property, and they know, from a shaft that has been sunk, and a drift that has been run under the hill, that gravel having in excess of \$1.00 per cubic yard exists for a distance of 56 feet under that hill. Whether it extends the final hundred feet or not no one knows, because no one has been under there. But the indications from the findings there as that drift was run were that that gravel would continue of the same general consistency.

Now, if the Government intended to limit itself to only 100,000 cubic yards, your Honor, it is the contention of the defendants that they could have limited themselves as to area or as to depth, or made some provision for the safeguard of the mining rights of the defendants.

Out of this 30 acres, your Honor, the estimates vary from 750,000 cubic yards of gravel, up to 1,400,000 cubic yards of gravel. But taking the lowest figure, 750,000 cubic yards of gravel, on that property, the Government, in taking 100,000 cubic yards, they now say, from this bar, Bar 1, saw fit by their condemnation suit to take not only

100,000 cubic yards from Bar 1, but to tie up Bar 2, and to preclude the defendants from taking possession of any part of the whole 40 acres, and reserving unto themselves the exclusive right of possession and uninterrupted occupancy of this property, for the purpose for a period of two years of taking whatever gravel was necessary for the construction [40] and the maintenance of this project.

Now, it is the contention of the defendants that since the exact amount has never been ascertained, since the Government has taken the possession of it pursuant to that Act of Congress—and I believe they are justified, as that Act reads—that that dam can be fixed anywhere that is suitable to the Government, providing that the hydraulic miners can afford to store their tailings behind it; that since that dam can be moved anywhere, and can be of any size or dimensions, as the engineers may design it, that the amount of gravel which the Engineering, or the War Department, the United States, the plaintiff, will take from this property, has never been determined. True, your Honor, we reach the anomalous situation that the Government has condemned an incorporeal right, and they have never enjoyed it, but the fact remains that they have condemned a right, and we are to determine not the utility of that right to the Government as it eventually materializes; we are determining in this action the cash value of that right at the time it was taken, and the defendants will contend that one of the items of damage in this case is the cash

value that must be placed on the day that the Government took possession of the uninterrupted right to occupy this property for a period of two years for the purpose of taking out gravel for the construction and maintenance of the dam.

Now, your Honor, even though we might concede that the Government could, by then plans—its then plans—limit the amount of gravel that would be used in the construction, we still have that element of maintenance, and just what gravel would be required for the maintenance of that dam I have no way of anticipating, nor has the Government in its preliminary showing made any indication of what might be contemplated or what might be [41] considered as the maintenance of that dam. But the language that was used, as your Honor will note in reading the complaint, is about as broad and gives the Government about as broad rights in this property as it is conceivably possible for anyone to have, and it is the defendants' contention that if the Government sees fit—even though they may be ill-advised in doing so—if they see fit to condemn more than they need, more than they want, they must pay for the right which they condemned, notwithstanding they didn't eventually use it, and that they eventually abandoned it.

Now then, in addition, your Honor, as another element of damages beyond the value of that right, we must necessarily concern ourselves with the value of the gold that is in that bar. And there will be evidence offered to show the recoverable gold values and the cost of recovery of that gold.

It is the defendants' contention that they are entitled to show what their profit would have been from the mining of this property during the one year and eleven months which the Government excluded them from possession, and that they are entitled to—in addition to the cash value of the right which the Government took they are entitled to the interest on the money which they would have made or which would be reasonably expected to have made had they been permitted to continue with their mining operations and not been excluded.

And while I realize, your Honor, that these things do not turn upon the hardships of the case, or upon the misfortune of any of the parties, we must bear in mind that if the Government was going to take a hundred thousand cubic yards of gravel from Bar 1, there is no conceivable reason in the world why the defendants should be excluded from the mining of Bar 2, nor is there any conceivable reason why the defendants should be [42] entirely excluded from Bar 1, because the evidence will disclose that the supply of gravel in that property east there, right out on the surface, available for excavation, was far in excess of 100,000 cubic yards that the Government estimated that they needed, and that the Government knew that at the time they condemned this property, and that we expressly sought to limit it for the purpose of enabling the defendants to mine; notwithstanding the fact that all those matters were well-known to the Government, they saw fit to take the entire 40 acres, and they must have done it for some reasons, your

Honor; they must have contemplated other uses of the gravel might exceed their anticipated uses, and they wanted to have it available in the event that they did.

Now, the defendant will also contend, your Honor, that since it was impossible for them to comply with these conditions, these so-called safeguards, that were supposedly thrown about this condemnation proceeding in order to protect the defendants; that since it was impossible for them to comply with those conditions, that the option was left open to the Government to take not only the gravel for concrete aggregates, but to take it without the recovery of the gold content. So actually, the way this condemnation complaint has been drawn, unless the defendant shows to the court by satisfactory and convincing evidence that there is gold of the recoverable value of a certain amount in these bars, and that there is gravel to a certain extent in these two bars, as this is drawn the Government has taken the right to remove both gold and gravel, and to use both gold and gravel for the construction and maintenance of this dam, consequently over and above the ordinary gravel value of this property the Government has taken the gold value—or at least taken the [43] right to have the gold value on this property, and to deprive the defendants of the gold value of this property—in other words, if your Honor can put yourself in my position in advising these people: The Government comes to them and says, “We want to take gravel from your property. Your gravel contains

gold. We are not the least bit concerned with that gold. If you can keep up with our contractor on the recovery of gold you are welcome to keep it; if you can't keep up with our contractor on the recovery of gold, then we want to take both the gold and the gravel, and not even bother about your gold, and put it into our dam."

Now then, you advise your clients how much you will charge the Government, what is the fair market value of the right to go into a person's property and take not only their gravel, but their gold, and to take as much as you want for a period of two years for a particular project; the exact, or even the approximate amount of gravel which will be necessary for them to take has never been determined, and has not today been determined. That is the question which, as I see it, your Honor has to decide, and it is toward the proof along those lines that the defendants' testimony will be offered.

(Whereupon a recess was taken until 2:00 o'clock p. m., at which time the premises in issue were to be viewed.) [44]

Tuesday, November 16, 1943

2:00 o'clock p. m.

(By prearrangement the Court, the Clerk, the Court's secretary, counsel for the respective parties and the court reporter, assembled at the Federal Building and were transported to the premises in issue, and upon arrival thereat, the premises were

viewed by the parties mentioned and the following proceedings took place:)

Mr. Cornish: Both the Government survey and ours are practically the same. They show the southeast corner in the middle of that open space (indicating). They show the cabin just about the same spot, and measurements show that the line is about 150 feet in from the cabin.

Then the question that was raised on the board this morning was over the west line, and this main channel stays in the same place the year around. There is a middle channel that leaves the main channel and makes that little island (indicating).

As the Government has surveyed it, the bar will run anywhere from 25 or 50 feet into the hill from here (indicating). The south line is just about where that green tree is. There is a single green tree (indicating), and the south line is just about where that green tree is, that is growing out of the bank there. The south line is just about on a line with that single tree. There is a dead tree, and there is another tree on farther down. That is about the south line.

The north line is beyond that abandoned cabin that you see there (indicating).

The bar is approximately a half-mile in length and an eighth of a mile in width.

The question was raised this morning as to the size of this [45] island. In most of the surveys, they surveyed only the west boundary of the bar, and that is approximately correct, but this island that is shown is supposed to be this little place

here (indicating), with a high water channel that cuts through, and at low water there is no water in there at all, and that island does not come down nearly as far as the cabin.

The river right along at the cabin is not nearly as wide as is shown here on the map (indicating). If you look down the river you will see that instead of cutting off at this angle, as shown on the map (indicating), the river makes a bend off this way (indicating).

It is the defendants' contention that the only part of the river that is accurately shown is that portion that bounds the bar here (indicating). The rest of it is merely estimated. There is an approximately even trough all the way down, with gravel, the same width all the way. The west bank of the stream is almost straight—that is, the west bank of the channel itself is almost straight. The water, of course, makes this cut across; the whole course of the river all along, with the exception of a few spots where a reef is showing through, is running over a pebble debris deposit. At high water, at flood time, the water comes clear up to the cabin. In fact, the tree that you see leaning over there (indicating), has been partly washed out. That brings in a new deposit of sand each year.

After that first high flood, then there is ordinary high water, and the ordinary high water runs along the edge of this bank (indicating) to one level, and then drops down to the second.

Mr. Foley, are you going to put on any evidence

of the location of this test, or those test pits to determine the gravel [46] content?

Mr. Foley: We will probably determine that after you get through with your case.

Mr. Cornish: Do you want to point them out here, to show about where they are located?

Mr. Foley: No.

Mr. Cornish: There will be some testimony that the shaft behind the cabin there, where you see the little sort of windlass there,—that shaft is caved in now, but when it was open, it was 22 feet to bedrock (indicating), and there is also a drift—there will also be testimony that a drift runs in from that 56 feet into the hill.

As I mentioned in the opening statement, as to the two bars, there is one down below, which almost all rock, and this one up above, which has a sand top (indicating). There is another spot about which there will be some testimony, and that is regarding a test pit that was put down. That was at the north end of the bar. If you want to walk up that way, I can show you just about where it was, but it was a little bit beyond that large tree, that green tree that you see standing there (indicating), and out possibly 75 feet toward the stream.

This machinery that you see (indicating) is some equipment that is immaterial to the cause. That machinery was installed and was washed out long before the Government became interested in it.

Mr. Morrison: Where did you say that you claim the south line is?

Mr. Foley: The south line is about where that green tree is there (indicating).

Mr. Morrison: No, that is not it exactly. It is within 150 [47] feet of that pile of lumber (indicating) below the green tree. It is a little farther down than you say.

(Thereupon the viewing of the premises was concluded and the party was returned to Sacramento, California, arriving at 6:30 o'clock p. m., whereupon an adjournment was taken until Wednesday, November 17, 1943, at 10:00 o'clock a. m.) [47a]

Wednesday, November 17, 1943
10:00 O'clock A. M.

The Clerk: United States versus 40.34 acres of land.

Mr. McMillan: Ready.

Mr. Cornish: Ready.

The Court: You may proceed, gentlemen.

Mr. McMillan: May it please your Honor, it was understood yesterday that after your Honor had returned from viewing the premises and court had resumed its session that the Government would make its opening statement. I therefore, at this time, on behalf of the Government, make this opening statement:

Opening Statement on Behalf of the Government

Mr. McMillan: The Rivers and Harbors Act.

with which your Honor is familiar, was of August 30, 1935, and that Act authorized the construction of the Ruck-a-Chucky Dam, the dam here under consideration, and that authorization was in pursuance of and adoption of the report of the Committee on Rivers and Harbors of the House of Representatives of the United States, known as Document No. 50. That Act authorized the construction of the Ruck-a-Chucky Dam.

Afterwards the Secretary of War authorized the filing of this action for the purpose of taking the property here involved and described in the complaint, and directed the Attorney General to bring the appropriate action.

On October 10, 1939, this action was commenced, and on that date summons was issued. It was commenced under the provisions of this Act, and also under the provisions of Section 591, Title 33, of the United States Codes, and an order of possession was made that date under the provisions of Title 33, Section 594, of the United States Codes. [48]

It appears that on or about October 17th possession was taken of the property through the contractor of the United States—that is, one George Pollock—and the possession was due to the extent which has already been indicated to the Court and contended by the Government of constructing a power line across the property, and in that connection setting up four poles, and for that reason it has been contended by the defendants that the Government took possession at that time and remained in possession from the beginning of this

action until we gave notice of abandonment on or about September 13, 1941.

Now, as has already been pointed out to your Honor, the complaint in this action sought to take an easement of two years over this property for uses in connection with the construction of the Ruck-a-Chucky Dam, and also to take concrete aggregates, that is, sand and gravel, necessary for the construction of that dam or incidental thereto.

It has already been pointed out and shown in the evidence that the construction engineers, in estimating the cost of this dam, had estimated that the amount of concrete aggregates would not exceed 75,000 cubic yards of gravel and sand.

Sometime before this suit was filed, as appears already by the statement made to your Honor by Mr. Cornish, negotiations were under way between the Government and Mr. Cornish's clients, the defendants appearing before this Court. The plan was that the Government was to take the 75,000 cubic yards of concrete aggregates and was to have the use of the premises for two years under an easement, and that the Government would pay a cash sum to the defendants to enable them to set up machinery there for the purpose of recovering the gold contents of the gravel that was taken. In short, the Government would feed the [49] gravel to the machinery set up, the defendants would then extract the gold from the gravel, and the tailings were to be returned to the Government.

Now, that was to be done by them, and if they

didn't do it, the Government could do it, and if neither the Government nor the defendants did it, the Government would take the concrete aggregates with the gold.

I call your Honor's attention, in connection with the delay, to some significant matters: Necessarily, the answer not having been filed in this case until March 25, 1941—the complaint was filed in this action October 10, 1939—it is significant in this record that the parties must have continued to negotiate until that answer was filed, and I think that the complaint itself, on its face—in fact, I am sure of it—shows that numerous defendants were joined in this action, and it is obvious that there was much title clearance.

The testimony in this case will show that the Defendants R. J. Miedel and F. M. O'Connor and Stella O'Connor did not make an application for a patent to the property until on or about August 4, 1938, and not until after this suit was filed, that is, on October 30, 1939, did they pay the money required in order to obtain the patent. And still later—long later, may it please your Honor—on August 28, 1940, the patent was issued, and not until that time did they actually have a patent or a title under patent to this land. This land, as a matter of fact, had been withdrawn from entry on or about January 11, 1928, and was not restored by the Government for mining locations until August 28, 1934.

Now, may it please your Honor, evidence has already been admitted, and there will be additional evidence, to show that [50] the construction was

not undertaken, for the reason that a landslide occurred up there on the river near the dam on February 28, 1940, and after this landslide took place considerable time elapsed to determine whether or not the debris could be cleared, and that it would be practicable, feasible, and economical, to go ahead with the construction of the dam at that place.

It was finally determined that that could not be done, and arrangements were made between the Government and the contractor satisfactorily for his release from the contract for the construction of the dam at that point.

Later on, as already indicated by the testimony, the Government set about to find another site on the Middle Fork of the American River and, as has already been shown by the evidence, too, about two miles below this property, or in that vicinity, they gave consideration for a considerable time to a proposed site there. After exploring that it was finally decided it was not practicable, feasible, or economical, to select a site at that point, and later on, as the evidence has already shown, a site was selected further up the river, about four miles above the original site selected, and in the selection of that site it was determined that different material would be required than the gravel concrete, and therefore it became manifest that the gravel which was sought to be taken by this action would no longer be required. Steps were then taken to go ahead and abandon the originally proposed site, and the War Department did notify the Attorney General that this site was no longer necessary or practicable

for use for the reasons which I have indicated, and instructed the Attorney General to bring appropriate proceedings for the dismissal of the condemnation proceeding.

Accordingly, on September 13, 1941—it will be remembered [51] by your Honor that the answer of the defendants in this case was not filed until March 25, 1941—the Government filed notice of dismissal and notice of abandonment of the proceedings. That is on September 13, 1941.

The defendants contend, of course, that the Government was in occupation of the premises until the notice of abandonment was filed. This notice of abandonment was given under the provisions of Section 1255(a) of the Code of Civil Procedure of the State of California (reading):

“Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of 30 days after final judgment, by serving on defendants and filing in court a written notice of such abandonment; and failure to comply with such Section 1251 of this Code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of any party, a judgment shall be entered dismissing the proceedings and awarding the defendants their costs and disbursements, which shall include all necessary expenses incurred in preparing for trial and reasonable attorneys’ fees. These costs and disbursements, including expenses and attorneys’ fees, may be claimed in and by a cost bill, to be prepared, served, filed, and taxed, as in civil ac-

tions; provided, however, that upon judgment of dismissal on motion of plaintiff, defendants, and each of them, may file a cost bill within 30 days after notice of entry of such judgment; that said costs and disbursements shall not include expenses incurred in preparing for trial where [52] the said action is dismissed 40 days prior to the time set for the trial of the said action."

A motion was made in pursuance of that section for the entry of a judgment of dismissal and abandonment. It was opposed by the defendants on the ground that we had gone into possession of the property and had remained in possession of the property for one year and eleven months, and that it would be inequitable to permit the abandonment, because of the possession which we had taken.

They further showed in that regard, or undertook to show, that it would be inequitable to force them into a court of claims when the matter could be heard before this Court, as to the compensation they were entitled to for the Government's use and occupancy of that property for that period of time.

The matter came on for hearing before His Honor, the Honorable Michael J. Roche, and it was continued from time to time. Finally, on May 6, 1942, the Court denied our motion to abandon on the ground that we had taken possession, and that it appeared to the Court inequitable for us to abandon the proceeding.

After that time, may it please your Honor, a motion was made before your Honor for leave to go upon the premises to test the gravel to deter-

mine their recoverable gold contents. That motion was opposed by the defendants. The hearing was had before your Honor, and your Honor made the order.

Since that time representatives of the Government, experts employed by the Government, have gone on the premises and have made tests of the gravel there to determine, and have determined, the recoverable gold contents. And in that connection a survey was made, and the proof will show that, and a proper survey by [53] experts, showing that the cubic yardage of the gravel on the premises from which gold may be recovered is not 1,400,000 cubic yards, or even 750,000 cubic yards, as contended by counsel for the defendants, but 527,000 cubic yards of gravel, and covering an exposed acreage area of 18.1 acres, and not 30 acres, as contended by counsel.

Now, may it please your Honor, the Government will produce here as witnesses, and testimony will be given to show that the fair market value at the time of the taking of this property, or at the time when it was sought to be taken, on October 10, 1939, taking into consideration all the uses to which it can be put, and conceding that the most profitable and highest use to which the property can be put is that of gold mining, and these witnesses being familiar with the tests made by the Government as to the quantity of recoverable gold, and some of these witnesses having taken part in making these tests, will testify that the reasonable market value of that property at the time

of taking, taking into consideration these tests, the yardage which I have referred to, did not exceed, several of the witnesses, the sum of \$15,000. That is for the entire property, with all the gravel and with all the sand and all the alleged gold that may be recovered from there. That is for the entire patent, the mining claim.

It will be remembered in this case that we took an easement for two years, with the right to recover gravel and sand, take gravel and sand to the extent I have already pointed out,—that is, 75,000 cubic yards of concrete aggregates.

Now, these witnesses are eminently qualified witnesses. One of the witnesses, Mr. R. D. Smith, a mining engineer for many years, connected with the Natomas Company, as I stated, it [54] will be shown that his qualifications as a mining engineer are eminent; his experience has been wide; he is familiar with mining properties and mining operations throughout this entire district, and he is familiar with this particular piece of property; he has studied that property, made examinations of that property; he has gone over surveys; he is familiar with the quantity of yardage there of gravel; it has been brought to his attention as a factor in making his estimate, the tests made by the Government; and other information he had, and studies. And it will be his testimony that the fair market value of that entire piece of property at the time of taking will not exceed \$12,000.

We will call Mr. A. F. Bishop, another gentleman of eminent qualifications, a member of the firm

of Lord & Bishop, knowing dredgers and dredging operations, having been engaged in the dredging business many years, and familiar with this entire mining district, familiar with this property, having studied and examined the property, and being one of the experts employed by the Government to make the tests on the property; taking into consideration all the matters which I have already indicated to your Honor, his testimony will be that the property, on August 1, 1939, the fair market value in cash would not exceed the sum of \$12,000.

The Government will also call, and he will testify here in this proceeding, Mr. A. F. Giddings. He is vice-president and, in fact, he is a third owner, of the General Dredging Company, which is operating a dredging business and mining business here, and has been operating a dredging business and mining business for many years. In fact, it will be shown his company is the owner of five dredgers, what are called "doodle-bug dredgers," with their equipment. And his testimony, being familiar with [55] all the matters, and having made the examinations and studies which I have already indicated, will be that the property, the fair market value at the time of taking, was not in excess of \$12,000.

We will call other witnesses, notably Mr. G. A. Bigelow, an eminent mining engineer connected with the Yuba Consolidated Mining Company, which is the successor of Hammond Mining Company. This gentleman is familiar with mining operations; he is familiar with mining properties; he is familiar with the best methods of mining; he is

familiar with this particular property, has made a study and examination of it, and he is familiar with the gold tests that have been made there; and likewise his testimony will be that the fair market value of that property at that time, taking into consideration all these matters I have indicated, did not exceed the sum of \$12,000.

We will call other witnesses with similar familiarity and qualifications. Their testimony will be not to exceed that figure.

We will call as a witness in this case a gentleman who has had wide experience in prospecting and in mining; who owns several mining claims right in that vicinity, one above and one below; who is peculiarly familiar with this property, having been once upon it, being interested in the very property here under consideration, and he has made a very careful study and examination of that property; he, too, is familiar with the tests which have been made showing the quantity of gold in this gravel, and he will testify that in his opinion the property, the entire property, mining claim, at the time of the taking by the Government in this case, did not exceed the fair market value of \$10,000. [56]

It will be shown and it will be contended by the Government in this case, may it please your Honor, that there never was factually or legally a taking of property here.

I call the Court's attention to the fact that this case is different from so many condemnation suits which have been tried before your Honor and which have been filed in this Court. Most of the con-

demnation cases filed, at the time of filing the complaint, there is filed with it a declaration of taking, and with that declaration of taking there is a deposit with the registry of the Court of the estimated just compensation for the taking of the property.

Now, upon the filing of the declaration of taking, the title vests in the United States. The property then becomes the property of the United States, and there is just one issue to be determined,—that is, the just compensation for the taking of the property, and the persons who are entitled to receive that compensation.

This is not such a case. No title ever vested in the United States upon the filing of this complaint. This complaint was filed under the provisions of the Rivers and Harbors Act I called your Honor's attention to, and the provisions of Section 591, Title 33, of United States Codes, and the character of complaint that is filed therein is similar to the character of complaint filed in a condemnation proceeding brought under the laws of the State of California.

As your Honor is well aware, upon the filing of the complaint in condemnation in California, no title vests, and no title vests until the judgment has been rendered in the case and the award has been finally paid, because even after the judgment has been rendered, the plaintiff has 30 days' time within which to abandon [57] the proceeding. And that is also the law of the United States.

In this proceeding, upon an affidavit showing the necessity for the property, and also that there are

funds available to pay any award which may be made in the case, also the necessity of taking immediate possession, and estimating, as in this case, the compensation for the taking, \$5,000, the order is made putting the plaintiffs in possession.

Now, in a proceeding of that character, similar to a proceeding under the law of California, no title vests. In California it is often contended that if the case does not come to trial for more than a year after the issuance of summons, as is the case here, the time of fixing the compensation, the market value of the property, is not at the time of the issuance of summons, but at the time of trial.

Now, were that so in this particular case, may it please your Honor, at the time of the trial of this case there would be no taking, because the evidence will show in this case that we took no gravel, that we took no sand, that we took no gold. We didn't take anything. We contend that in this case the proper measure of compensation is to determine the market value of the property at the time of the taking, and in accordance with the testimony which will be given by these experts who are familiar with the value of the property at the time of the taking, if the Court is satisfied that their testimony is correct, that the value of the entire property is \$15,000, and we, only having the use and occupancy of the premises for one year and eleven months, they would then be entitled to the proper rental value on that valuation of the market value for the easement for two years, a fair rental value based upon the valuation of the entire property at

\$15,000, would be, at seven per cent interest, not to [58] exceed seven per cent interest for one year and eleven months, plus interest on that amount of interest, figured upon the original valuation of the property. That is our contention.

It is our contention, and the authorities, we will contend, agree with us, that there is in this case no possible way of fixing it otherwise, because it is unique—we took nothing. We kept these people out of possession of the property; we were in use and occupation of it. They are entitled, we concede, to receive the proper rental value of that property for that time, and nothing else. They have the gravel, they have the gold, and it is not a case, may it please your Honor, where the Government stepped in and there was an enterprise in operation. There was no mining enterprise in operation. Counsel contends that they should be compensated because they were not allowed to continue their mining operations. Well, there was none.

The testimony in this case will show that there were no mining operations at the time the Government went in and took possession of that property.

Now, whether or not, if the Government had not taken possession and kept them out of possession, they would have started mining operations, we contend, is too conjectural, and too remote to be taken into consideration in fixing the just compensation in this matter, and, may it please your Honor, we are upheld in that contention by a long line of Supreme Court decisions. I think the latest expres-

sion on that of our Supreme Court is the Powelson case, the Tennessee Valley Authority matter, that compensation is not to be paid for just a proposed project; compensation is not to be paid for frustration of any proposed project.

I emphasize, there is no mining enterprise in operation here. [59] There is now on that property no mine set up.

I think I can explain it and set it forth in clearer words by reading just a few sentences from that decision itself. That decision to which I have referred is *United States versus Powelson*, which was decided May 17, 1943, and I have it here as reported in 63 Supreme Court Reporter, at page 1047. It will be contended that this language, this ruling, is wholly applicable to this particular situation (reading):

“There are numerous business losses which result from condemnation of properties but which are not compensable under the 5th Amendment. The point is well illustrated by two other lines of cases in this field. It is a well settled rule that while it is the owner’s loss, not the taker’s gain, which is the measure of compensation for the property taken,”——

citing *United States versus Miller*, a case which was tried before your Honor, and other cases (continuing reading)——

——“not all losses suffered by the owner are compensable under the 5th Amendment. In absence of a statutory mandate,”——

again citing *United States versus Miller* (continuing reading)——

——“the sovereign must pay only for what it takes, not for opportunities which the owner may lose. On the one hand are such cases as *Monongahela Navigation Company versus United States*, where it was held that the United States had appropriated a growing enterprise to its own ends and must make compensation accordingly. But it is well settled in this court that, ‘Frustration and appropriation are essentially different things.’ ”——

citing many cases (continuing reading)——

——“Thus in *Mitchell versus the United States* the owner was denied compensation for the destruction of his business which resulted from the taking of his land for a public project, even though the business could not be reestablished elsewhere,”——

and so forth.

I have pointed out that this is a case in which, under their contention, there was a disappointment in a project that they may have had in mind, that they may have intended; there was a frustration of some project that they may have had in mind, just like in this *Powelson* case, where there were millions of dollars involved, and where the Supreme Court of the United States overruled the Circuit Court of Appeals, and a judgment amounting to around a million dollars which had already been reduced by the Circuit Court of Appeals was fur-

ther reduced down to around a hundred thousand dollars, as I remember.

There could not be any other measure, may it please your Honor. If the valuation were to be based upon the amount of recoverable gold, all sorts of speculative elements would enter into it, as the Court has said in other cases, especially in timber cases. A suit is brought to condemn, we will say, a lumbering district. It has been held time and time again—the leading case, I think, is *Morton versus United States*—you cannot set up a business there and contend that if you cut down the trees, and that you manufacture lumber, and all that, and value them separately, that that is an item to be taken into consideration separately from the value of the land. These all enter into the elements of value of the land itself, the highest market value. [61]

In reference to minerals, I have a brief statement here which is supported by authorities in California, supported by Supreme Court decisions, and supported by a very well known Pennsylvania case involving an entry which is similar to this (reading):

“Where the land taken contains minerals the measure of compensation is the market value of the land with the minerals in it, and the value of the minerals cannot be shown separately.”

I am reading now from 29 *Corpus Juris Secundum*, page 1043, and I cite your Honor to the several cases cited there, and additional cases cited under Section 246, page 749, 20 *Corpus Juris*.

To proceed and fix value upon that theory, may it please your Honor, would mean this: Counsel contending that he lost the opportunity to mine this property, to set up a project and go ahead, and therefore he could have taken out millions of dollars, and that he is entitled to interest on that, would be a case of not only after receiving an award of that character, but that he could go ahead the next day and sell the very property itself, because nothing had been taken. It would be a case in which afterwards, after the war, for example, that the price for gold may be higher and the cost of equipment may be less.

The witnesses to whom I referred, may it please your Honor, in fixing the market value of the property, will testify with reference to the mining of that property up there, the best methods of mining, the most feasible methods of mining, and in that connection they will testify that this is a difficult piece of property to mine. It is suggested the best method would be the doodle-bug with its equipment, but in that connection they say that the property is not easily accessible, and that there [62] is bedrock there which is hard to work in, and that the main portion of recoverable gold is in the few feet of gravel just above the bedrock, and they have taken into consideration this factor: that to operate that singly is speculative; it might not prove very profitable. That if they were united with other mining claims around there it would be in a better situation, but to go in there and mine this alone is an altogether different situation. They

will testify that it is dangerous and unsafe to take equipment in there at certain seasons of the year; that the time to go in there and mine on that property and take a dredging outfit in there would be from the month of May through the month of November. During the other months of the year, the winter time, the water is high, and there are storms, and taking machinery in there might result, as has taken place now and then in dredging operations, that the entire equipment is lost. But in going in there and dredging gravel of this small quantity, it would not be practicable, it would not be economical to go in there for a few months of the year and leave your equipment there and come back the next year, but you should come in with equipment large enough, with a doodle-bug large enough; you have to go in there with a doodle-bug, and with the equipment, we will say, of two yards' capacity, and be able to go ahead and dredge at least 100,000 yards a month, and during that period, we will say from May to November, this entire yardage would be dredged. But to go in there with one of smaller capacity, you couldn't complete the work seasonably. An outfit of that size would cost in the neighborhood of from ninety to one hundred thousand dollars.

It will be contended in this case, may it please your Honor, that obviously, if you take an easement to a piece of property, [63] to one piece of property, a property that is not a part of a larger parcel to which severance damages could come, an easement of two years' time, certainly wouldn't

have a greater value than the fee of the property. Necessarily so. In this case, to give to the defendants in this case a valuation higher for this easement of two years, this occupancy of two years, we not having taken anything, would be a case in which the tail wags the dog, and, as I pointed out before, having been allowed that valuation and compensation of that character, they, still having the gold, the sand, the gravel, and the property, could turn around and resell it for the full market value.

I think this valuation on the measure of damages we contend for is the correct one, and it is the only one under the circumstances of this case that may be adopted.

In this case I have called your Honor's attention to enough facts and testimony that will be introduced in this case to indicate that it is unique in character. We haven't taken anything from the property. The problem is the valuation of the use and occupancy of that property for a period of one year and eleven months, and we contend that that is what they are entitled to, and nothing more.

May it please your Honor, I submit that the claims made by counsel in this case, and the valuations that he is contending for, are, relatively speaking, as fantastic and as exaggerated and speculative as those made by one of the defendants in this case, Mr. W. H. Morrison, when he filed an affidavit resisting our motion to go in and make tests on that property, in which affidavit he stated that (reading):

“In addition to said free gold, 1½ percent of the total deposit of gravel and sand on said real [64] property is what is commonly called black sand; that said black sand contains platinum, irridium, and other valuable mineral elements of the platinum group; that approximately 45,000,000 pounds of said black sand is in said deposit, and said black sand is of the reasonable value of \$1.00 per pound or more.”

In other words, in an affidavit filed in this proceeding one of the defendants in this case is making the statement that there is \$45,000,000 worth of black sand in that property which your Honor viewed yesterday.

Mr. Cornish: May it please your Honor, Mr. McMillan, in his opening statement, has proceeded upon the theory that the most that the Government can be required to pay is the value of this property as it was—

Mr. McMillan: May it please your Honor, counsel has made his opening statement and we have made our opening statement.

The Court: Yes. I think you should defer that to your argument.

Mr. Cornish: There are just one or two points I would like to call your Honor's attention to before we put on testimony. I believe it will be helpful to your Honor in listening to the witnesses. But if Mr. McMillan prefers I don't do so—

Mr. McMillan: I respectfully submit, may it please your Honor, that the orderly process will be that as testimony is offered the parties make

their objections and motions to strike, and if there are any arguments to be made, they may be appropriately made at that time.

The Court: Yes.

Mr. Cornish: Does your Honor intend to take a recess this morning? [65]

The Court: Yes. We will recess for ten minutes.

(Recess.)

The Court: You may proceed, gentlemen.

Mr. Cornish: May it please your Honor, attached to the complaint as Exhibit A is a copy of a map which shows the meets and bounds description of a survey of this property made by the War Department Engineers. I have just spoken to Mr. McMillan, and I would like to obtain from him, if he has it available, for the purposes of the record, the meets and bounds description of the gravel bar on the inside of the bend, as surveyed by the War Department Engineers, which was placed on a map similar to this.

Your Honor will note on the exhibit the points are shown as survey points. On that portion of the river, on the land lying immediately to the east, the Southern Pacific Land Company, your Honor will note a series of lines and dots indicating survey points, and the survey at that time continued on down the river, and there is a survey in the possession of the engineers showing the meets and bounds of that gravel bar, and if those figures are available I would like to introduce them in evi-

dence, or if not available at this time, maybe after lunch——

Mr. McMillan: May it please your Honor, I have neither the figures nor the map referred to here. I will cast about and check it up at lunch time, and see if I can get them.

The Court: You may do that.

Mr. Cornish: Very well.

I will call Mr. Morrison.

WILLIAM HARLAN MORRISON,

Called for the Defendants; sworn. [66]

Direct Examination

Mr. Cornish: Q. Mr. Morrison, you are the W. H. Morrison named as one of the defendants in this case? A. Correct.

Q. And where do you live, Mr. Morrison?

A. At the present time, in Walnut Creek, on the Pacheco Highway.

Q. And you are engaged in business, are you?

A. I am.

Q. And what is your business?

A. Jewelry business.

Q. And how long have you been engaged in the jewelry business.

A. At various times, 40 years.

Q. Have you, during that time, been engaged in any other business?

A. I have; mining.

(Testimony of William Harlan Morrison.)

Q. Mining. And in what districts or localities have you been engaged in mining?

A. Alaska; various sections in Alaska. In San Luis Obispo County, California; and in Calaveras County, Amador County, now in El Dorado County.

Q. In your operations in Alaska you were concerned with the mining of what commodities?

A. Gold.

Q. And in Calaveras and Amador Counties?

A. Also gold.

Q. And in El Dorado County?

A. El Dorado County, gold and associated elements, whatever happens to be there.

Q. And in San Luis Obispo County?

A. Manganese, chrome, and molybdenite.

Q. During what years were you engaged in the mining of gold in Alaska, Mr. Morrison?

A. 1901 to 1904—no, three years; I left there in 1903.

Q. And during what years were you engaged in the mining of gold in Calaveras and Amador Counties? A. 1907 to about 1909.

Q. During what years were you engaged in the mining of chromium in San Luis Obispo County?

A. From 1914 to the close of the war, 1918. [67]

Q. In your mining operations in El Dorado County, during what period were you engaged in those?

A. I first became interested in El Dorado

(Testimony of William Harlan Morrison.)

County in 1932. No serious work was done until 1934.

Q. And that has continued—your connections, although not active at all times, in mining, have continued to date? A. To date.

Q. In your jewelry business, Mr. Morrison, are you concerned with the retail sales of jewelry only, or with other lines?

A. Manufacturing as well.

Q. And has your time in the jewelry business been devoted primarily to retailing, or manufacturing? A. I would say about half and half.

Q. And in the course of your business of a manufacturing jeweler, what has been the extent of the work you have done and the knowledge you have acquired of gold and other precious elements used in the jewelry line?

A. Refining, assaying, determining the qualities and quantities of different elements.

Q. In this project on the Middle Fork of the American River, Mr. Morrison, have you had any associates in business with you?

A. Yes, I have.

Q. And who are those associates?

A. R. J. Miedel, R. B. Somerby, a man by the name of Fisher, who is now deceased, and, of course, the original owners.

Q. Mr. and Mrs. O'Connor?

A. The O'Connors.

Q. And in the course of your operations in El Dorado County in association with Mr. Miedel and

(Testimony of William Harlan Morrison.)

Mr. Somerby, what duties have you each performed?

A. Mine has been the management; I have had charge of the property.

Mr. McMillan: May it please your Honor, I didn't hear that [68] answer. May it be read?

The Court: Yes; the reporter will read the answer.

(Answer read by the reporter.)

Mr. Cornish: Q. Now, at the time you and your associates first became interested in this property in 1934, were you at that time operating it? A. We were in 1934.

Q. Were you actively managing it at that time, or was someone else managing it?

A. We started the plant under my supervision, but under the management of Tex Crone and Frank Crone.

Q. During the time that the property was under your supervision and under the management of the two Crones was any mining machinery installed?

A. Yes, there was a complete plant put in there, a stationary plant, at the upper end of the claim.

Q. That was at the north end?

A. North end.

Q. And was any mining done?

A. Considerable mining was done, yes; a cut perhaps 300 feet long. However, I didn't measure it exactly.

Q. You say a cut was about 300 feet long?

A. About 300 feet long.

(Testimony of William Harlan Morrison.)

Q. You made no accurate measurement of it, however? A. No, not at all.

Q. How deep was that cut, and how wide?

A. Approximately 10 feet deep, and the width varied, because the plant was stationary and the line fanned out——

Q. How wide would you say it was?

A. The width varied. Perhaps 40 feet wide at the south end.

Q. Forty feet wide at the south end, tapering, I take it, to a point at the north?

A. Tapering to the width of the bucket at the north, which was $4\frac{1}{2}$ feet.

Q. And was the actual recovery of that gold under your personal [69] supervision, or under the supervision of Mr. Crone?

A. It was under my personal supervision.

Q. And did you have access to the sluice box—— were you the only one who had access to the sluice box, or did others have? A. Others had.

Q. And was any gold shipped to the United States Mint?

A. Yes; there was three cleanups, three different shipments.

Q. And was the shipment to the United States Mint and the recovery under your personal supervision, or was that handled by one of your associates?

A. Well, I could explain it. I sent it down there to the plant, and it was taken over to the Mint by Mr. Somerby.

(Testimony of William Harlan Morrison.)

Q. Now, at the time that the Government became interested in this property for the purpose of obtaining gravel, was that plant still in operation?

A. No; we had shut it down to make some changes.

Q. And what had become of that plant at, let us say, in 1939?

A. 1939? Floods took it out and distributed it all over the river.

Q. It wasn't then in working order at the time when the Government became interested in this from the gravel standpoint?

A. That is correct.

Q. Now, when this cut you have described was opened, did you, yourself, make any examination of the gravel in the vicinity of that cut for the purpose of determining its gold content?

A. Many pan tests were made. We weren't getting from the plant what the tests indicated we should get. In other words, it was very bad management. And to prove it, I put a test pit in the center of that cut down to bedrock.

Q. How deep did that pit go from the bottom of the cut to bedrock? [70]

A. I haven't the log here. I will have to do some figuring. (Referring to memorandum book.)

Q. Let me withdraw that question. Did you prepare a log on that hole as you went in?

A. I did.

Q. What were the dimensions of that hole?

(Testimony of William Harlan Morrison.)

A. The working dimensions were four by four feet.

Q. Is this document which I hand you, Mr. Morrison, the log to which you referred (exhibiting document to the witness)?

A. This is.

Q. Now, can you step to the blackboard, Mr. Morrison, and place an "X" on that board that would approximate the position where that test pit was sunk?

A. (Witness marks on blackboard.) About in that position, possibly a little closer to this channel, but it has changed—the flood waters racing through there has changed it. I would say that is about right.

Q. Now, we will mark that cross "M-1," designating the position of the test pit (marking on blackboard). Now, will you describe just what you did in the way of making tests of the gravel removed from this pit, as you sunk the pit from the bottom of the cut to the bedrock?

A. Well, in the beginning we selected $2\frac{1}{2}$ —I will take that back— $4\frac{1}{2}$ cubic foot samples. The size of the bucket was measured, and our samples ran $4\frac{1}{2}$ cubic feet, and the computations were based upon that figure.

Q. And what, if anything, did you do with the gold that was recovered from that test?

A. Preserved it in bottles.

Q. Do you know where those bottles are now?

A. I wish I did. They were presented in evi-

(Testimony of William Harlan Morrison.)
dence in court in Auburn and lost by the Property Custodian there.

Q. You haven't seen them since they were offered in evidence in [71] Auburn?

A. I haven't seen them since they were offered in evidence in Auburn.

Q. Now, this proceeding in Auburn at which they were offered in evidence was the trial of the case of American River Gold Mining Company against O'Connor and others?

A. That is correct.

Q. And that was in the Superior Court of Placer County?

A. Superior Court of Placer County.

Q. Now, can you, Mr. Morrison, from that log, and from any other records which you made at the time, testify as to what gold content you found in the gravel that was removed from that pit?

A. Yes.

Mr. McMillan: Well, may it please your Honor, I object to that upon the ground that the proper foundation has not been laid. The manner of making this test, and the integrity thereof, and its competency, have not been shown—his competency has not been completely established—or may I state this: Should I reserve that objection for a motion to strike at the conclusion of his testimony and my cross examination of the witness?

Mr. Cornish: I will withdraw the question, your Honor.

(Testimony of William Harlan Morrison.)

Q. Mr. Morrison, what experience have you had in testing gravels?

A. Well, I should say a great deal. It is a little difficult to describe to those unfamiliar with the process, but I used a cleanup table of my own design, which recovers, I think, all, or nearly all, of the values; sufficiently accurately to bet you money on the mining operation.

Q. Under this process was there anything in this process that you used that would add gold that wasn't there before?

A. Not unless one wants to fool himself. I don't believe I ever did that.

Mr. McMillan: May I have that answer? [72]

The Court: Yes.

The Witness: I say, not unless one wants to fool himself. You don't add gold to the test if you are testing with the idea of investing your own money. That is what I meant to answer.

Mr. Cornish: Q. What was the purpose of making this test, Mr. Morrison?

A. With a view of putting a dredger in there of the proper capacity, and working the property as it should be done.

Q. For whose information was this test made?

A. Myself and my partners'.

Q. When did you make this test?

A. The test was completed September 10th. We had a great deal of trouble with water——

Q. September 10th of what year?

A. September 10, 1934.

(Testimony of William Harlan Morrison.)

Q. And at that time, at the time you made this test, had the Government made any overtures to you to obtain gravel from this property?

A. None whatever at that time.

Q. And did you have any litigation in mind at the time this test was made?

A. None whatever. Merely a question of investing our money.

Q. Now then, will you describe to the Court the process that you used for taking out this gravel, measuring it, and recovering the gold from the measured samples?

A. Well, we first provided the timbers and the lagging—we had to lag it very tight, because the ground is loose; it is in a constant state of flex, with gravel below the water line. And we lagged it as tightly as we could, driving the lagging ahead——

The Court: Speak a little louder, please.

A. (continuing) We lagged it as tightly as possible in there to help control the water, put two by six and two by eight laggings, whatever was on the job at the time—we had a great deal of [73] lumber and used whatever was convenient—and drove the lagging ahead in order to keep the water out as much as possible; took all the material out, and at different levels took measured samples, which was put over this cleanup table I referred to, the gold was recovered by mercury—that is, the small portions from the black sand which was impossible to pan out closely enough—we took it out

(Testimony of William Harlan Morrison.)

by mercury, cleaned it, measured the samples, and made our records.

Mr. Cornish: Q. Now, will you describe, Mr. Morrison, the position in this test pit from which you took each sample, and what your sample established was the gold content per yard of that gravel?

A. The first sample was taken at the top——

Mr. McMillan: May it please your Honor,——

A. (continuing) ——from $4\frac{1}{2}$ cubic feet——

Mr. Cornish: Just a moment.

Mr. McMillan: That is all right. I will reserve my objection for a motion to strike.

Mr. Cornish: Q. Go ahead, Mr. Morrison.

A. The first sample was taken at the top; from $4\frac{1}{2}$ cubic feet of material, we recovered $62/100$ of a pennyweight of gold. We made our estimates on the basis of \$31.00 an ounce, or \$1.55 per pennyweight.

Q. And that showed what gold content?

A. $40/100$ of a pennyweight, and a value of 62 cents.

Q. 62 cents per cubic yard?

A. Cubic yard.

Q. Going from the top of that hole, Mr. Morrison, down to the second test you made, what did that indicate?

A. My log was prepared on this basis: The distances from the bedrock. No. 2 sample, five feet off the bedrock produced $80/100$ of a pennyweight.

Q. That would be how much per cubic yard?

A. Value, \$1.24 per cubic yard.

(Testimony of William Harlan Morrison.)

Q. And the third sample, Mr. Morrison?

A. No. 3 sample, four feet off the bedrock, 93/100 of a pennyweight, value \$1.44 per cubic yard.

Q. And the fourth sample, Mr. Morrison?

A. No. 4 sample, one foot off the bedrock, 2.40 pennyweights of gold, value \$3.72 per pennyweight—per ton—not ton—cubic yard.

Q. Cubic yard?

A. Cubic yard. I will take that back.

Q. Your fifth sample, Mr. Morrison?

A. The fifth sample was cleaned up from the bedrock, a measured sample off the bedrock produced 3.37 pennyweights of gold, a value of \$5.22 per cubic yard.

Q. And what did you say again, Mr. Morrison, was the value per cubic yard of the third sample?

A. Third sample, 93/100.

Q. And that was how much per cubic yard?

A. Per cubic yard, \$1.44.

Q. On the log here, Mr. Morrison, is the figure, "One pennyweight; value \$1.55."

A. I realize that. I took that from memory, because my notes weren't the same as the log. You can throw that one out if you like.

Mr. Cornish: We offer this log in evidence, if the Court please, and ask that it be marked defendants' exhibit.

The Court: Admitted.

(The log referred to was received in evidence and marked Defendants' Exhibit A.)

(Testimony of William Harlan Morrison.)

Mr. Cornish: Q. Now, Mr. Morrison, turning your attention to a shaft to the east of the cabin that is on the property, did you make any examination of the gold content of the gravel in and about that shaft? A. I did. [75]

Q. And at what time was that examination made, Mr. Morrison?

A. That shaft was completely caved, and I reopened it in the summer of 1937.

Q. And what work did you do after reopening that shaft?

A. We timbered it up about six by six inside measurement, six feet by six feet. We made no attempt to test that gravel until we reached the bedrock?

Sample No. 1, —

Q. Now, before you testify to the samples, Mr. Morrison, after you got the pit opened, did you do any other work on the bedrock or underground?

A. Yes; we cut a sump $2\frac{1}{2}$ feet into the bedrock to let water accumulate while we worked.

Q. Did you have any other operations—

A. Started a cross-cut or drift to the east.

Q. How far did you run that drift?

A. 56 feet.

Q. That 56 feet would be under the bank?

A. Under the bank.

Q. Did you drift in any other direction, other than the east?

A. In 1939 I ran a 10-foot—or about 12-foot,

(Testimony of William Harlan Morrison.)

I should say, drift to the north from the bottom of the same shaft.

Q. Now, you made some tests of the gold contents of the gravel that you found in the bottom of this pit and in the two drifts? A. We did.

Q. And at the time that those tests were made had any overtures been made by the United States for the acquisition of that gravel?

A. 1939—1937—I think we were talking in the office about erecting the plant and doing such things as that at various times, but no overtures had really been made.

Q. Well, at the time that you made any tests of the gold content of that gravel had a condemnation proceeding been started? In [76] other words, did you make your test, Mr. Morrison, before or after October, 1939?

A. Yes. This test was made in the summer; perhaps August.

Q. August of 1939? A. 1937.

Q. And that would be two years before the condemnation proceeding?

A. Oh, yes, two years before the condemnation proceeding.

Q. And what was your purpose in making those tests?

A. A combination of assessment work, and to satisfy myself how far the values were under the bank.

Q. And what did you find in reference to the continuation of values under the bank?

(Testimony of William Harlan Morrison.)

A. The entire 56 feet carries values.

Q. And how does it compare in composition as to sand and rock and the general geological formation, as compared with the rest of the bar?

A. Precisely the same as the bar.

Q. The same material?

A. Precisely the same.

Q. Now, what samples, if any, Mr. Morrison, did you make in that tunnel, in that shaft, and in that drift, and what values, if any, did you recover?

A. Four samples were taken in the drift, one in the north drift, and I have a sixth sample in the combination, which was cleaned up in the bed-rock—crevicing around.

Q. Now, what did you do, Mr. Morrison, with the gold which you recovered from those samples?

A. Preserved in bottles, and later estimated its value.

Q. And do you still have those bottles?

A. Yes, I brought them with me this morning. I believe you have them there.

Q. Now, this gold which is in these bottles, Mr. Morrison, did any portion of that come from any course other than in this shaft [77] and these drifts?

A. None whatever.

Q. Nothing was added to your samples in ascertaining the gold content?

A. None whatever. I may add that some of those samples are not complete now, because they have been shown a great many times, and some of the weights may not come up to the original weight.

(Testimony of William Harlan Morrison.)

Q. I will show you a small bottle marked No. 1, "2½"—? A. Pennyweights.

Q. (continuing) —pennyweights," and ask you if you can identify this sample?

A. That is the measured sample, a yard of material, from the tunnel, right after the first timbers were set, at the start of the tunnel.

Q. That would be how far?

Mr. McMillan: May I inquire of counsel, is he contending that the Government was going to take gravel under this hill?

Mr. Cornish: I don't know what the Government was going to take, Mr. McMillan. The Government has never limited itself. All I know is the Government had 40 acres——

Mr. McMillan: Your contention is that the Government was intending to take this gravel and material from under the hill?

Mr. Cornish: I don't know, Mr. McMillan. I tried a long time to find out where the Government was going to take it, and they never told me.

Q. That was taken, Mr. Morrison, how far from the shaft?

A. Well, just under the bank, where the first timbers were set.

Q. That would be at the face?

A. At the face of the tunnel, or edge of the shaft.

Q. And what did a measured yard of that material show as to gold contents?

A. 2½ pennyweights of gold. [78]

(Testimony of William Harlan Morrison.)

Q. And the contents of this bottle is the gold to which you refer? A. Precisely.

Mr. Cornish: We offer this in evidence, if the Court please, and ask that it be marked Defendants' Exhibits next in order.

The Court: Admitted.

(The gold sample referred to was received in evidence and marked Defendants' Exhibit B.)

Mr. Cornish: Q. Now, I show you another bottle, Mr. Morrison, marked No. 2 drift, 1.40 d.

A. That is pennyweight.

Q. And ask you if you can identify this?

A. That was taken two feet into the tunnel. 1.40 pennyweights, a value of \$2.17 per cubic yard.

Q. And that was taken from a measured yard, was it? A. Measured yard of material.

Q. I notice, Mr. Morrison, that the bulk of this sample is flaked, with the exception of one nugget.

A. That is correct. One nugget was in a little crevice, where it had not had the bouncing of the gravels washing over it.

Mr. Cornish: We offer this in evidence and ask that it be marked Defendants' Exhibit next in order.

The Court: Admitted.

(The gold sample referred to was received in evidence and marked Defendants' Exhibit C.)

Mr. Cornish: Q. I will show you a third bottle, Mr. Morrison, marked "No. 3 drift, 2.60 d., 10"—?

(Testimony of William Harlan Morrison.)

A. Ten feet in the drift.

Q. (continuing) —“10 feet in the drift,” and ask you if you can identify that sample?

A. Yes, indeed.

Q. And what is that, Mr. Morrison?

A. That is gold, 70/100 [79] of a pennyweight.

Q. Now, Mr. Morrison, I call your attention to the difference in the appearance of the gold in Sample No. 2 and Sample No. 3, and ask you if you can explain the difference in the color?

A. That is the natural color, this dark color. When it comes out of the ground it has that color. The other sample we cleaned with nitric acid to remove every trace of mercury before weighing.

Q. And this Sample No. 3 has not been cleaned?

A. Has not been cleaned, that is correct.

Mr. Cornish: We offer, your Honor, this Sample No. 3 in evidence, and ask that it be marked Defendants' Exhibit D.

The Court: Admitted.

(The gold sample referred to was received in evidence and marked Defendants' Exhibit D.)

Mr. Cornish: Q. Now, Mr. Morrison, would you testify again to the number of pennyweights of this sample, No. 3?

A. No, 3, 2.60, a value of \$4.03 per cubic yard.

Q. You testified a moment ago 7/10 of a pennyweight. Was that correct? A. No; 2.60.

Q. 2.60? A. Yes.

(Testimony of William Harlan Morrison.)

Q. I will show you a bottle marked No. 4, 15 feet in, 70/100.

A. 70/100. That would be 7/10.

Mr. McMillan: Mr. Cornish, may I inquire, are we still under the hill now?

Mr. Cornish: Yes.

The Witness: Not really under a hill; just a bank, where the cabin is.

Mr. Cornish: Q. This is taken at a point 15 feet east of the shaft? A. 15 feet.

Q. Behind the cabin?

A. Where the shaft goes down. [80]

Q. And what did that sample show as to value?

A. 70/100 pennyweight, 7/10, a value of \$1.08 per cubic yard.

Q. How much?

A. \$1.08, plus or minus. I didn't carry out these fractions.

Mr. Cornish: We offer this sample, No. 4, in evidence, and ask that it be marked Defendants' Exhibit E.

The Court: Admitted.

(The gold sample referred to was received in evidence and marked Defendants' Exhibit E.)

Mr. Cornish: Q. Now I show you, Mr. Morrison, a fifth bottle, marked "No. 5, 1.20 d.," and ask you if you can identify that sample?

A. That is No. 5; came from the north drift, where we did our assessment work.

Q. And when was that removed?

A. Just one moment. That was the summer of

(Testimony of William Harlan Morrison.)

1938, I believe, the assessment work in the summer of 1938.

Q. And that showed what content per cubic yard, Mr. Morrison?

A. 1.20 pennyweights, value \$1.86.

Mr. Cornish: I offer that in evidence, if the Court please, and ask it be marked Defendants' Exhibit F.

The Court: Admitted.

(The gold sample referred to was received in evidence and marked Defendants' Exhibit F.)

The Witness: I find a note here that was 1939, instead of 1938.

Mr. Cornish: Q. In 1939?

A. 1939.

Q. I show you another bottle, marked "No. 6," marked "Assessment, June, 1939, No. 6, 2.20 pennyweights."

A. That is correct. This was cleaned off the bedrock from that point [81] forward. We had never cleaned up the bedrock, and this was the result of it.

Q. That was in the north drift, or in the east drift? A. In the east drift.

Q. And Sample No. 6 was cleaned up in 1939 off the bedrock in the east drift?

A. That is correct.

Q. And that represented what volume of gravel?

A. That was never measured. It was just cleaned up and panned.

(Testimony of William Harlan Morrison.)

Q. Was it more or less than a cubic yard?

A. Very much less.

Q. Less than a cubic yard?

A. Less than a cubic yard, yes.

Q. From the bedrock in that drift of a volume less than a cubic yard you recovered 2.2 pennyweights? A. That is correct.

Q. And that would be, Mr. Morrison, out of a cubic yard—that is, assuming this had come from a cubic yard of material—would be what value per cubic yard?

A. I think I figured that—I am not sure—2.2 pennyweights—\$1.55. If His Honor will bear with me a moment, I can give it to you. (Computing on paper) \$3.25½.

Mr. McMillan: Q. What was that figure?

A. \$3.25½, if it were a yard.

Mr. Cornish: We offer this in evidence, if the Court please, and ask that it be marked Defendants' Exhibit G.

The Court: Admitted.

(The gold sample referred to was received in evidence and marked Defendants' Exhibit G.)

Mr. Cornish: Q. Now, Mr. Morrison, in the examinations that you have made on that property, did you find that the gold is all of the flake variety that is in these bottles, or did you find——

A. No; there are some quite heavy pieces of gold. There is one [82] in the box there, wrapped with a piece of newspaper.

(Testimony of William Harlan Morrison.)

Q. I show you a piece of what appears to be yellow metal. A. That is gold.

Q. And ask you if you can identify that?

A. Very nice gold, I should say. I saw it taken from the bedrock on the claim at the lower end.

Q. This was taken from the 40 acres that is in question in this proceeding?

A. That is correct.

Q. And from the bedrock in what locality, Mr. Morrison?

A. Where the line starts into the river, right on the bend, the bedrock——

Q. That would be, then, down approximately at this point, where the river crosses the property (indicating)?

A. That is correct, right at that point.

Q. At the extreme south end of the gravel bar on the inside of the bend of the river.

Mr. Cornish: We offer this in evidence, if the Court please, and ask that it be marked Defendants' Exhibit H.

The Court: Admitted.

(The newspaper-wrapped gold nugget referred to was received in evidence and marked Defendants' Exhibit H.)

Mr. Cornish: I can give you the box and you can put it in the box.

The Clerk: It is easily lost. Thank you.

Mr. Cornish: Q. Mr. Morrison, you and Mr. Miedel and Mr. Somerby applied for a patent on this ground? A. That is correct.

(Testimony of William Harlan Morrison.)

Q. And prior to the application for the patent it is true, is it not, that you and Mr. Somerby and Mr. Fisher assigned your interest in the property to Mr. Miedel? [83]

A. That is correct.

Q. And the application for the patent then was made in the names of Fred O'Connor, Stella O'Connor, his wife, and Mr. Miedel?

A. That is correct.

Q. Now, did you examine the papers, the application for the patent and the other papers in connection with the patent?

A. Not certainly, no.

Q. Did you know from what source the information as to the gold content in that bar to justify the application for a patent was derived?

A. That came——

Mr. McMillan: May it please your Honor, that is incompetent; and the proper foundation has not been laid; and it is self-serving; and it calls for hearsay evidence.

The Court: The objection is sustained.

Mr. Cornish: May I state to the Court the purpose of my question? It is necessary, in filing for a mineral patent, to show that you have made a substantial recovery of gold, and I wish, by this line of questioning, to establish that these figures to which the witness has just testified, were the figures that were put into the application for the patent, which application was subsequently granted. Now, if counsel objects to that——

Mr. McMillan: May it please the Court, it is

(Testimony of William Harlan Morrison.)

entirely irrelevant. A person may file for a patent and make these claims, and then afterwards an investigation is made by the Department—even after the patent is issued; even after that the Government may seek to bring an action for the cancellation of the patent. The information you wish to call His Honor's attention to is within His Honor's knowledge. It is the requirement in order to obtain a patent. I object on the ground it is [84] irrelevant and incompetent.

The Court: Let the ruling stand. Proceed.

Mr. Cornish: Q. Do you recall, Mr. Morrison, during the spring, or the late winter of—between 1939 and 1940, representatives of Contractor Pollock coming down onto this property?

A. Yes, I do.

Q. And with whom did you deal?

Mr. McMillan: I object to that question, may it please your Honor,—a representative of Mr. Pollock—upon the ground that it assumes a fact not yet established. It is a loaded question, containing an assumption not yet established.

The Court: The objection is sustained.

Mr. Cornish: Q. Did you have a conversation, Mr. Morrison, in the early part of the year 1940, with a Mr. Hoops? A. I did.

Q. And at that time where was that conversation held, Mr. Morrison?

A. On the property.

Q. Did Mr. Hoops at that time exhibit to you a

(Testimony of William Harlan Morrison.)

document purporting to be a copy of an order of this Court? A. That is right; he did.

Q. And what conversation ensued, Mr. Morrison, concerning that document?

Mr. McMillan: I object to that, may it please your Honor, upon the ground the proper foundation has not been laid; not in any way binding on the Government; it is *res inter alios acta*, transactions had, so far as we are concerned, with a stranger. We don't know who the person is, —

The Court: The objection is sustained.

Mr. McMillan (continuing): —what his capacity was, or how he could bind the Government.

Mr. Cornish: Q. At that time, Mr. Morrison, what, if any, claim did Mr. Hoops make as to the right to go onto the property?

Mr. McMillan: That is objected to, may it please your Honor, upon similar grounds.

The Court: The same ruling.

Mr. Cornish: If the Court please, there is on file in this proceeding an original order made by this Court granting the Government possession of this property, and it is the purpose of this question to show—Mr. McMillan has stated, in his opening statement, that Mr. Pollock is the contractor who took over the contract on this land, and it was abandoned because of the landslide—and the purpose of the questioning is to show, your Honor, that Mr. Pollock came onto this property, and claimed under this order to have possession. It is

(Testimony of William Harlan Morrison.)

not to bind the Government on anything, other than to show their contractor claimed possession.

Mr. McMillan: Then, in that respect, may it please your Honor, he hasn't laid the foundation as to who this person was. I repeat that up to this moment it is *inter alios acta*, any conversation had with other persons. He should first establish who these persons were, and their authority.

Mr. Cornish: Q. Who was this Mr. Hoops, Mr. Morrison?

A. He represented himself as Mr. Pollock's superintendent on the job.

Mr. McMillan: Now, I object to that, may it please your Honor, and ask that it be stricken out.

The Court: Sustained.

Mr. Cornish: Q. Did you see this man Hoops on any other occasions? A. Many times.

Q. And what was he doing when you saw him on other occasions? [86]

A. Directing the work of the contractors.

Mr. McMillan: May I have that answer?

The Court: Yes.

(Record read by the reporter.)

The Witness: Directing the work of the contractors, the Pollock Company.

Mr. Cornish: Q. As a matter of fact, you know he was one of Mr. Pollock's foremen on the job?

A. I since learned that he was, after I had seen him there.

Mr. McMillan: I ask that his testimony be

(Testimony of William Harlan Morrison.)

stricken out, because it is obvious now he didn't learn until afterwards he was connected with Mr. Pollock, who was the contractor.

The Court: Yes. The motion is granted.

Mr. Cornish: Q. When did you first learn Mr. Hoops was Mr. Pollock's foreman?

A. When he displayed this document and told me—

Mr. McMillan: Now, may it please your Honor, counsel is not only asking leading questions, but he is asking loaded questions. He assumes, in his questions, some facts, some testimony that must be first established. "When did you first learn" he was his foreman? He hasn't yet established, in that connection, that Mr. Pollock at this particular time was the contractor for the Government.

Mr. Cornish: Mr. McMillan, do you contend that Mr. Pollock wasn't the contractor for the Government?

Mr. McMillan: If you will give me the date I will tell you whether or not he was, at that time, contractor for the Government.

Mr. Cornish: In January, 1940.

Mr. McMillan: He was. [87]

Mr. Cornish: He was the contractor?

Mr. McMillan: He was the contractor in so far as the construction of this Ruck-a-Chucky Dam is concerned.

Mr. Cornish: And in October, 1939?

Mr. McMillan: Yes.

Mr. Cornish: He was the contractor?

(Testimony of William Harlan Morrison.)

Mr. McMillan: Yes.

The Court: The Court will recess until two o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p. m.) [88]

Wednesday, November 17, 1943

2:00 o'Clock p. m.

The Clerk: United States versus 40.34 acres of land.

The Court: Proceed, gentlemen.

WILLIAM HARLAN MORRISON,

Recalled for the Defendants; previously sworn.

Direct Examination (resumed)

Mr. Cornish: Q. Mr. Morrison, at the time that you had this conversation with Mr. Hoops on the property involved, and he showed you a copy of the Court order, did you, in that conversation, discuss anything other than the Court order?

A. Oh, yes. I asked him why they were tearing the place up.

Q. Did you at that time discuss arrangements to be made between yourself and Mr. Pollock for both of you having access to the property?

Mr. McMillan: May it please the Court, may I ask counsel to fix the time, the place, the persons present, and the circumstances?

(Testimony of William Harlan Morrison.)

The Court: Yes.

Mr. Cornish: Q. What is the closest you can fix the date of this first conversation when Mr. Hoops showed you this Court order, with reference to the time that the suit was filed?

A. It was immediately after the suit was filed.

Q. That would be in the latter part of October, then, of 1939?

A. I presume so, although my memory is faulty on that. But it was immediately after the suit was filed.

Q. At that time—at the time that you talked to Mr. Hoops, had the contractor already been on the property? A. Absolutely.

Q. Had the contractor at that time done anything to the property, [89] or made any change in the property.

A. Yes. He cut a path up, and was erecting a power line, and he stripped branches off of trees, and cut other trees down, and had poles for power and wire.

Q. At or about the time you had this conversation with Mr. Hoops, did you take some photographs of the property? A. I did.

(Whereupon Mr. Cornish handed several photographs to Mr. McMillan.)

Mr. McMillan: May it please the Court, may I ask counsel if this is intended to show the extent of the possession that the Government had taken at that time?

Mr. Cornish: It is not intended to show the

(Testimony of William Harlan Morrison.)

extent. It is to show that the Government's contractor had come on the property. The photographs do not show the full extent to which the contractor came on the property, but they do show that the contractor was on the property at that time.

The Court: You may proceed.

Mr. Cornish: Q. I will refer to this photograph as Defendants' Exhibit I for identification, and I will ask you if you can identify that photograph (handing photograph to the witness)?

A. Yes. This is one of the photographs I took at the time.

Q. I call your attention, in that photograph, to what appear to be oil drums at the left-hand side of the picture, right behind the automobile. Do you know who put them there? I will withdraw that. Do you know who owned them?

A. I don't know precisely who owned them. I presume the oil company owned them. But they were brought on there by the contractor.

Mr. McMillan: I move to strike the answer upon the ground that it is not responsive. [90]

The Court: The answer will be stricken.

Mr. Cornish: Q. Do you know who brought those oil drums on the property?

A. They were brought there by Mr. Pollock. They were brought there by the contractor under Mr. Hoop's supervision.

Q. In the background of that picture, I will call your attention to some lumber, and I will ask you if you know who brought that lumber on the property?

(Testimony of William Harlan Morrison.)

A. I do not know who brought this pile of lumber (indicating on photograph), but this (indicating) is scrap lumber that was on the property.

Q. The lumber on the right-hand side of the picture is scrap lumber which was on the property?

A. Yes, sir.

Q. That was on the property?

A. Yes, sir.

Q. The lumber on the left-hand side of the property you did not bring on the property?

A. No, sir. My reason for asking him the question about why they were tearing the property up, is that I had that tree posted—

Q. I call your attention also, Mr. Morrison, to a tree that is on the right center of the picture, on which there is a sign. Can you read that sign that appears in the photograph (handing photograph to the witness)?

A. It would be a little difficult to read it, but I know what that sign said.

Q. What did that sign say?

A. It said, “No Trespassing,” and gave my name and address.

Q. At the time you were on the property immediately prior to, or immediately before this picture was taken, what was the appearance of that tree with reference to the way that it appears in this photograph (indicating on photograph)?

A. It was a leafed tree in front of my cabin.

Q. Was there foliage on it?

A. There was foliage on it. [91]

(Testimony of William Harlan Morrison.)

Q. Did that tree, at the time you took that picture, appear as it does in the photograph?

A. Yes, sir.

Q. Do you know who cut that tree that way?

A. One of the employees of the contractor.

Q. That is, one of Mr. Pollock's men?

A. Yes, sir.

Q. At the time you took this photograph were there any wires connected to that pole line (indicating)?

A. The cross-arms were there, and there was wire on the property.

Q. Was a wire connected up to that cross-arm on the tree?

A. There were two lines on it, yes.

Q. Was it afterwards connected up?

A. Yes, sir.

Q. By whom was it connected?

A. By the contractor.

Mr. Cornish: We ask that this photograph, which has been marked Defendants' Exhibit I for identification, be received in evidence.

The Court: Admitted.

The Clerk: Defendants' Exhibit I.

(The photograph referred to was received in evidence and marked Defendants' Exhibit I.)

Mr. Cornish: Q. Now, I show you another photograph, Mr. Morrison, and ask you if you can testify as to the time when that photograph was taken (handing photograph to the witness), which you are now holding?

(Testimony of William Harlan Morrison.)

A. It was taken the same day.

Q. On what portion of the property was that taken?

A. This (indicating on photograph) is north. Perhaps just about opposite the original pit which I testified to.

Q. That would be at the northern end of the bar, near the point marked "M-1" on the blackboard, or marked "M" on the blackboard?

A. Not quite that far. Halfway between the "X" and the bank.

Q. Calling your attention to what was apparently another tree, [92] with short branches sticking out on it, and beneath which appears to be a pole (indicating). Can you identify that object?

A. That was a tree that had been in full bloom and was denuded to make a power pole.

Q. By whom was it denuded?

A. Also by the contractor.

Q. And also the tree on the left side of the photograph?

A. That had been cut down.

Q. That had been cut down by whom?

A. By the contractor.

Mr. Cornish: The photograph to which the witness has just been testifying, has been marked or referred to as Defendants' Exhibit J. I now offer in evidence this photograph marked Defendants' Exhibit J for identification, concerning which the witness has just testified.

The Court: Admitted.

The Clerk: Defendants' Exhibit J.

(The photograph referred to was received

(Testimony of William Harlan Morrison.)

in evidence and marked Defendants' Exhibit J.)

Mr. Cornish: Q. I will show you another photograph, Mr. Morrison, and I will ask you if you can testify at what time that photograph was taken, and what it represents (handing photograph to the witness)?

A. That photograph was taken on the same day. It shows a view of the cabin, and also shows the first pole made out of a tree, to which I testified, this photograph showing the cross-arm on it.

Q. That would be taken from what point on the bar, and looking in what direction?

A. Looking south through the avenue that had been stripped of trees to make room for the power line.

Q. That would be in about what position on the blackboard.

A. Standing just opposite the arrow where "Bank" is marked there, and looking south. [93]

Q. I call your attention to an object that looks like a pole with a cross-arm on it, and I will ask you if you can identify that object (indicating on photograph)?

A. That is the cross-arm on the tree. That is not visible in one of the other pictures.

Mr. Cornish: We now offer in evidence this picture which has been marked Defendants' Exhibit K for identification, and concerning which the witness has testified.

The Court: Admitted.

(Testimony of William Harlan Morrison.)

The Clerk: Defendants' Exhibit K.

(The photograph referred to was received in evidence and marked Defendants' Exhibit K.)

Mr. Cornish: Q. Now I show you another photograph, Mr. Morrison (handing photograph to the witness), and ask you if you can testify when that photograph was taken?

A. At the same time. It is looking across the river.

Q. That would be taken in approximately about what position that is shown on the black-board?

A. Standing about where "X" is marked there, and running diagonally across the river, looking generally towards the northwest.

Q. There is an object which appears there rather faintly and indistinctly on the right-hand side of the photograph. Can you identify that?

A. That is a tree that had been denuded to carry the power line.

Q. And that had been denuded by the contractor? A. Yes, sir.

Q. I call your attention also to a cross-arm at the top of that tree (indicating on photograph).

A. Yes, sir. That was placed there by the contractor.

Q. In this photograph, I call your attention to a small white object in the lower right center of that photograph, and I will ask you if you can identify that (indicating on photograph)? [94]

A. That is a post or marker at one of the pits which tested the gravel.

Q. That was one of how many pits?

A. Five, If I remember correctly.

Q. Do you know by whom those pits had been dug?

A. The United States Engineers, I was informed when they were being dug. That was done there prior to the denuding of the trees.

Mr. McMillan: May it please the Court, may I ask how much prior?

Mr. Cornish: I will stipulate that that was done before the condemnation suit was started.

We offer in evidence this photograph, concerning which the witness has testified, and ask that it be marked Defendants' Exhibit L.

The Court: Admitted.

The Clerk: Defendants' Exhibit L.

(The photograph referred to was received in evidence and marked Defendants' Exhibit L.)

Mr. Cornish: Q. Now, Mr. Morrison, after you talked to Mr. Hoops, and he showed you the Court order, did you and Mr. Hoops discuss the matter of the two of you having access to the property?

Mr. McMillan: I object to that, may it please the Court, until the proper foundation has been laid. There is no testimony yet which indicates who Mr. Hoops is, and how he would bind the Government. It is a conversation between strangers.

The Court: Objection sustained.

Mr. Cornish: The testimony has shown that Mr.

(Testimony of William Harlan Morrison.)

Hoops was foreman for Mr. Pollock. That was testified to before lunch.

Mr. McMillan: Suppose he was the foreman for Mr. Pollock, your Honor? Still he could in no way bind the Government in this [95] matter.

Mr. Cornish: May it please the Court, the Government condemned this property for the purpose of permitting the contractor, as the Government's agent, to go in there and use the property. It seems to me that if the Government turned this property over to the contractor pursuant to the performance of the contract, for the construction of this dam, that whatever arrangements the contractor made with Mr. Morrison are certainly binding upon the property, because, after all, it was anticipated from the very beginning, not that the Government would take this gravel, but the contractor would take this gravel and use it—use the aggregates in building the dam.

The Court: The Court will withdraw its ruling. The objection is overruled.

Mr. Cornish: Q. Will you relate the conversation you had with Mr. Hoops regarding the two of you having access to that property?

The Witness: May I use the language that was used at that time?

The Court: I don't know what kind of language was used.

The Witness: It was not profane. It was a little heated, though, in fact.

A. I asked him by what strange notion he came

(Testimony of William Harlan Morrison.)

on there to tear up our property, and he patted his coat pocket and said, if I remember correctly—and I think I do—"I represent your Uncle Samuel." That was his language. "I have here an order which permits me to do it, and to do these things."

And I asked when he had received it, and he said he had received it the day before.

"Well," I said, "I have no desire to stand in your way. What [96] can I do to cooperate? I have brought my family up here. We have a house, or a cabin, that we live in from time to time, and" I said, "do you have any objection to that?"

And he said, "No, not at all, except that we feel that we must lock the gate on the road. We are storing powder in kegs in the tunnel."

So we agreed at that time that we would keep the gate locked, and he was to have a key, and I was to have one, and he was to be very careful who he presented that key to.

Mr. Cornish: Q. And from that time you and Mr. Hoops had the key to that gate?

A. That is right.

Q. And except for Mr. Hoops and yourself, no one else had access to that property?

A. That is true.

Q. At that time was anything said about the removal of the cabin?

A. Yes. He told me he wanted to put the plant right where my cabin stood. There was some question of moving it, and he thought the easiest way

(Testimony of William Harlan Morrison.)

would be to set fire to it. That was a joke, of course.

Q. Mr. Morrison, over how long a period prior to the commencement of this matter did negotiations with the United States Engineers concerning this property continue?

A. More than a year, I should say.

Q. And who represented your interests and Mr. Miedel's interests, and Mr. Somerby's interests, and Mr. O'Connor's interests? In other words, who took your part in those negotiations?

A. Yourself.

Q. Anyone else? Were you present at some of them?

A. I was present at nearly all conferences, yes.

Q. How about Mr. Miedel?

A. Mr. Miedel came to most of them, too. [97]

Q. Where were these conferences held, Mr. Morrison? A. In Judge Hjelm's office.

Q. Were they all held in Judge Hjelm's office?

A. Except visits which I made to the United States Engineers' Office several months prior to the conferences.

Q. You had made some previous visits to the United States Engineers' Office?

A. That is true.

Q. And later conferences were held in Mr. Hjelm's office? A. That is correct.

Q. And who, besides Mr. Hjelm, was present, representing the United States?

(Testimony of William Harlan Morrison.)

A. Major—my goodness, I can't think of his name now!

Q. Was Mr. Stanley present?

A. Mr. Stanley was present at most of the conferences.

Q. How about Colonel Chambers?

A. Colonel Chambers was also present.

Q. In these conferences, was anything said by you, or anyone representing your interests, about the gold values that you claimed to be on this property?

A. Yes. There was a good deal of discussion on the matter.

Q. What was said in those conferences concerning your contention as to the gold values, and the location of the gold on the property that is involved in this suit?

A. My contention was that it should be limited in depth in order to protect our interests, and Mr. Stanley's reply was that he had no desire to limit the contractor on the depth or area, either, if I remember rightly, and I think I do.

Q. Do you recall what was said about the importance of the limitation of the contractor in the depth to which he would go?

Mr. McMillan: May it please the Court, I ask that the time [98] be fixed.

The Court: Yes.

Mr. Cornish: Q. Can you fix the time of these conferences, Mr. Morrison?

(Testimony of William Harlan Morrison.)

A. Yes. Some of them were nearly a year before the condemnation proceedings.

Q. Throughout the various conferences discussing the matter of the conditions under which this gravel would be taken, was substantially the same contention made at each conference?

A. Yes, sir; that is correct.

Q. What was said by you, or by someone representing you, in your presence, and in the presence of Mr. Hjelm and Mr. Stanley, concerning the importance and the reason why you desired the contractor to be limited as to the depth he would excavate on this bar?

A. We always thought and said at every appearance that the materials——

Mr. McMillan: We object to that, because we think it is conceded that there was no excavation of any gravel in this case.

Mr. Cornish: May I state, if it please your Honor, that the purpose of asking these questions is that counsel stated in his opening statement that he intends to show that the Government intended to upset only 100,000 yards of gravel on the property, and that the gravel which the contractor would take was not the gravel under the hill; it was not the gravel on the west side of the river; but was the gravel in this bar, and the surface gravels that were more accessible than the heavier gravels and the richer gravels down below. My object in this examination, your Honor, is to prove that prior to the filing of this condemnation suit the

(Testimony of William Harlan Morrison.)
defendants made every effort to acquaint the Government with their contentions that the substantial values lay in the lower portion of this bar; that there were two bars, one of which—— [99]

Mr. McMillan: I will withdraw the objection at this time, your Honor.

Mr. Cornish: Q. Will you state, Mr. Morrison, what was said by you and your representatives concerning the importance of limiting the contractor as to the lengths he would go?

A. Well, we at every opportunity stressed the fact that we did not want, if it wasn't necessary, the gravels in the lower levels taken, and the reply was—I think Mr. Stanley's words were that at no time would he agree that the contractor should be limited.

Q. In these conferences what was said by you and by those representing your interests,—and by “your interests” I mean those of yourself, and Mr. Somerby, and Mr. Miedel—concerning the mining of one bar, and permitting the Government to operate on the other bar?

A. We asked permission on several occasions to be allowed to work, because we had negotiations under way for an operation.

Q. And what was the reply of Mr. Hjelm and Mr. Stanley?

A. We were told that they didn't want us in the way.

Q. What, if anything, was said by yourself and those representing you, as to limiting the contractor

(Testimony of William Harlan Morrison.)

over that 40 acres, upon which he might remove his gravel?

A. Nothing but a refusal to do so. I don't remember the exact language, but they just would not limit the contractor.

Q. Was any request made to limit the contractor?
A. Yes, sir.

Q. What was said in that regard, Mr. Morrison, if you can remember?

A. "We don't intend to limit the contractor." I think they were the exact words.

Q. What was said by those who represented you, to Mr. Stanley and Mr. Hjelm in that regard?

A. As a matter of fact, there is [100] correspondence filed on the subject.

Q. Do you recall the conversations?

A. Yes. Many times, when the request was made, the answer was, "No, we don't want you in the way." That is as near as I can tell now.

Q. In those conversations was the volume of available gravel discussed?

A. Only in a general way. I believe one of the engineers said, "We find there is sufficient gravel for our purposes," but I don't believe the quantity was discussed.

Q. Was the necessity for the contractor having the whole 40 acres in order to have that amount of gravel discussed?
A. Yes, sir, it was.

Q. What was said in that regard?

A. They said they didn't want us in the way;

(Testimony of William Harlan Morrison.)

that we would be obstructing them. That was always the answer.

Q. State just what you and those representing you said to the Government in that regard, as to the quantity of gravel actually available, as compared to the amount that Mr. Stanley said he believed the contractor would require.

A. Well, I know in one conference in Judge Hjelm's office I asked why in the world, gentlemen, we could not proceed with our plans, and agree to keep out of the way, and they said no, it could not be done; it just could not be done. I do remember one conversation where the contention was made that it was necessary to change the roads around, and we would be in the way of the coming and going of trucks and equipment.

Q. At or about the time that the Government filed this suit, Mr. Morrison, in October of 1939, was there any marketability for the sale of this property, by yourself and your associates?

A. Yes. We had five different firms asking permission to lease it or buy it, and one, a local resident. [101]

Q. And there were those five different concerns that were attempting to negotiate a lease or a sale at or about the time that this condemnation proceeding was started?

A. Yes; both before and after.

Q. That was both before and after?

A. That is right.

Q. And what, if any, attempt was made by you

(Testimony of William Harlan Morrison.)

or your associates to accept any offers that were made for the sale or lease of the property?

A. None after the condemnation was started. I distinctly remember writing a letter to a Sacramento concern, stating that they were negotiating for that gravel, and we were not in a position to consider any kind of an offer at the time.

Q. Besides turning down the offers you had for the sale of the property?

A. No, not for the sale of the property.

Q. How about the leasing of the property?

A. We had a number of opportunities for those.

Q. Did you discuss those with any of the proposed lessees?

A. We talked about the gravel, but we always came back to the point that we were negotiating with the Government, and that we were unable to do anything because we didn't have the property to dispose of.

Q. Mr. Morrison, what experience have you had in testing gravels under water, or in a state of flux as a result of the permeation of water?

A. Only on this property, except one other case, and that was on the Tanana in Alaska. That was in a state of flux.

Q. Have you, in your experience in testing in gravels, had an opportunity to compare the results obtained by tests with churn drills and testing with pits?

A. Yes, sir; positively.

Q. Will you explain to the Court the difference you obtained, and the result, and why that result

(Testimony of William Harlan Morrison.)
was different in the case of a [102] churn drill test, than when you sink a pit?

A. When you sink a pit, and timber it, you take out every ounce of the material, and make a thorough and reliable test. And when you narrow it down to a churn drill, you run the drill up and down, and the gold is precipitated, and it goes down on the bedrock, and the water that is flowing over it carries it off, and it is never gotten in the drilling test.

Q. As to the gold content that would be disclosed by sinking a pit, and the gold content that would be disclosed by churn drilling, what would be the difference?

A. I should say you wouldn't get more than 10 or 15 per cent of the gold close to the water any place. If you get back in the bank, where there is no great amount of water, perhaps the test could be relied upon, but not where the test is made in the bar itself.

Q. What is the physical reaction that takes place in the ordinary process of panning or separation of gold from the other materials in placer?

A. Well, in my language, you keep it in a state of agitation, and the difference in the specific gravity of the different materials causes it to align itself in the pan, and the lighter material comes to the top and washes off.

Q. That is what takes place in the ordinary process? A. Yes.

Q. Does that same physical change in the prop-

(Testimony of William Harlan Morrison.)

erty take place with the operation of a churn drill, where it is agitated in the flux?

A. Very much so.

Q. In your opinion, Mr. Morrison, would a churn drill test show the presence of any gold over an area of any size?

A. Not in my opinion. I have been told——

Mr. McMillan: I object to that upon the ground that it is [103] hearsay and incompetent.

The Witness: I won't say it. I realize that.

A. (continuing) In my opinion, it is impossible to make an adequate test of that property with drill holes.

Mr. Cornish: Q. You are familiar with the specifications pertaining to the taking of gravel, as they appeared in the contract between Mr. Pollock and the United States Government?

A. I should say I am quite familiar with it, yes. I purchased that prospectus at that time.

Q. As a matter of fact, you examined those specifications and went over them with a view to constructing a plant to work in conjunction with the contractor's gravel plant?

A. That is true.

Q. And those provisions, Mr. Morrison, are substantially the same as the provisions that are set forth in the complaint, on pages 4, 4-A, and 4-B, with reference to the recovery of the gold by the owners?

A. Yes, with one or two important exceptions.

Q. Now, I call your attention, Mr. Morrison,

(Testimony of William Harlan Morrison.)

first, particularly to some of those specifications as they appear on page 4—and I will read now from the single-spaced portion of page 4 of the complaint (reading):

“The sand and gravel plant to be constructed by the United States of America so as to permit the installation of gold recovery devices requiring a vertical drop of not more than 20 feet for materials which will pass a standard one-quarter inch screen, and a vertical drop of not more than eight feet for material which is retained on a standard one-quarter inch screen but passes a standard one-inch screen, said gold recovery devices to be furnished, installed, and operated by the [104] owner and, except as specifically indicated below, without cost to the United States of America.”

I call your attention, Mr. Morrison, to that paragraph. Was the matter of the elevation of that material and the vertical drop discussed in these conferences between yourself and the interests that you represented, and the United States?

A. Absolutely.

Q. And what, if anything, was said in those conferences concerning the 20-foot drop for material which would pass a standard one-quarter inch screen? A. I didn't get the question.

Q. What, if any thing, was said in those conferences concerning the vertical drop of 20 feet for material which would pass a standard one-quarter inch screen?

(Testimony of William Harlan Morrison.)

A. A great deal was said. Incidentally, the process was reversed——

Mr. McMillan: I move to strike the answer as not responsive.

The Court: The answer will be stricken.

Mr. Cornish: Q. Was the matter of the elevation of that material and the vertical drop discussed in these conferences between yourself and the interests that you represented, and the United States,—calling your attention particularly to that provision of the specifications which I read (reading):

“The sand and gravel plant to be constructed by the United States of America so as to permit the installation of gold recovery devices requiring a vertical drop of not more than 20 feet for materials which will pass a standard one-quarter inch screen, and a vertical drop of not more than eight feet for material which is retained on a standard one-quarter inch screen but passes a standard one-inch screen,”——

A. Yes, it was. I said it was, absolutely. [105]

Q. And what was said in those conferences concerning the 20-foot drop for material which would pass a standard one-quarter inch screen, and a vertical drop of not more than 20 feet for material which is retained on a standard one-quarter inch screen but passes a standard one-inch screen?

A. That is what I was trying to tell you. That language is wrong there. The *modus operandi* is reversed; it is just the other way around.

(Testimony of William Harlan Morrison.)

Mr. McMillan: I move that the witness' answer be stricken upon the ground that it is not responsive.

The Court: The answer is stricken.

Mr. Cornish: Q. Was that subject discussed, that question of the vertical drop discussed?

A. Absolutely.

Q. What was said by you?

A. I contended that we needed that in order to pass the material over those devices by gravity.

Mr. McMillan: I move that that answer be stricken upon the ground that it is not responsive.

The Court: Stricken.

Mr. Cornish: Q. The question is, Mr. Morrison: What did you tell them?

A. I told them what I wanted. I told them I wanted 20 feet of drop for material which goes over that fineness, and eight feet would be sufficient for the quarter-inch. They garbled it. It was just reversed the way they made it.

Q. In other words, what you mean is that in the conference what was discussed was just the reverse of what they put in the specifications?

A. Absolutely.

Q. What is the reason for those drops that are specified?

A. In order to make the materials pass through your plant by gravity, so that you will not have to use power to elevate.

Q. Calling your attention to Paragraph A, at

(Testimony of William Harlan Morrison.)
the top of page 4-A of the complaint, I read the following (reading): [106]

“All material which will pass a standard one-inch screen to be segregated by the United States of America into two sizes, and delivered to the gold recovery devices by force of gravity from screen or trommel in such a manner that no material amount of gold is lost before delivery. Separate sizes to be delivered to the top of the gold recovery devices are to be as follows:

“(a) All material which will pass a standard one-quarter inch screen;

“(b) All material which is retained on a standard one-quarter inch screen but passes a standard one-inch screen.”

Was the matter of the separation of those two sizes of gravel discussed in the conferences between yourself and the United States representatives?

A. Yes. I was asked why that was necessary and my reply was that the method of treatment for the fine was in jigs and Ainley bowls, which the larger stuff would go over the riffles.

Q. And what, if anything, was said by the United States, or those representing the United States, concerning the separation?

A. I think they agreed with me at that time that the——

Mr. McMillan: Just one moment.

May it please the Court, I move that that be stricken.

The Court: Stricken.

(Testimony of William Harlan Morrison.)

Mr. Cornish: Q. Just state what they said concerning those requirements?

A. They agreed to do so.

Q. They said they would do so?

A. Yes, indeed.

Q. Now, reading the next paragraph of those specifications, Mr. Morrison, being paragraph (b), at line 9, on page 4-A (reading):

“Sufficient water to be delivered by the United [107] States of America to the top of the gold recovery devices for their efficient operations, such amount not to exceed 2,100 gallons per minute.”

Was that discussed?

A. That was discussed.

Q. What, if anything, was said by you in those conferences concerning the requirement of 2,100 gallons of water per minute?

A. There was considerable conversation about it. In the beginning, the size of the plant that was to separate the gravel was too——

Mr. McMillan: May I ask that the answer go out as not responsive, may it please the Court?

The Court: Yes; it will go out.

The Witness: I scarcely know how to answer the question any other way.

Mr. Cornish: Q. Let me ask you this question: In connection with the gallonage of water per minute, was the rate of the removal of the gravel from the bar discussed? A. Positively.

Q. What was said at those conferences concerning the relation of the amount of gravel that would

(Testimony of William Harlan Morrison.)

be removed from the bar, or the rate of removal of gravel from the bar, as compared to the gallonage of water?

A. My request for the quantity of material to be handled per hour brought a response of 100 yards an hour, and I discussed the quantity of water at that time, and that was agreed to.

Q. In other words, this figure of 2,100 gallons of water per minute was based upon the removal of 100 yards of gravel per hour?

A. That is correct.

Q. Now, reading paragraph (c) (reading):

“Sufficient electrical energy to be delivered by the United States of America to the gold recovery [108] devices for their efficient operation, such amount not to exceed 20 horsepower of connected load.”

What, if anything, was said at those conferences concerning the relation of the horsepower to operate the gold recovery devices, as compared with the rate at which the gravel would be removed from the bar?

A. The discussion was based upon 100 yards per hour, and that 20 horsepower would be more than adequate. We agreed on that.

Q. Now, calling your attention to paragraph (F), as it appears on page 4-A of the complaint, between lines 24 and 25 (reading):

“The owner to operate the gold recovery devices in such manner and at a rate that the prime purpose of the sand and gravel plant, i. e., the pro-

(Testimony of William Harlan Morrison.)
duction of cleaned, well graded sand and gravel, will not be retarded.”

What, if anything, was said at those conferences regarding that matter mentioned in the paragraph which I have just read, as compared to the rate of the removal of the gravel from the bar?

A. At that time there was much discussion on the amount and the quantity, and the quality of material to be brought to us. It was our contention that our plant must be adequate. In other words, I felt that the contractor and I had to work very carefully together, and I believe at that time the United States Engineers agreed with me that that was the proper thing. The exact words used escape me now. It has been a long time ago.

Q. Mr. Morrison, would a plant that operated with 2,100 gallons of water per minute, with an electrical energy of 20 horsepower of connected load, handle gravel in such a manner that the prime purpose of recovery of sand and gravel would not be impeded in the operation at a rate in excess of 100 yards per hour removal [109] from the plant?

A. Positively not. It would bury it hopelessly.

Q. Was there anything said, Mr. Morrison, in these conferences between yourself and the engineers, concerning the limitation of the contractor as to the amount or rate at which he would dig the gravel from the bar for refining?

A. Yes.

Q. What was said?

A. I think Mr. Stanley made the assertion that the contractor would be more or less under their

(Testimony of William Harlan Morrison.)

supervision, and would be required to limit his production to that point.

Q. Now, Mr. Morrison, for a stationary plant what, in your opinion, is the value to a miner of the digging of the gravel, the elevating of the gravel to the heights that I have just read, and the furnishing of the amount of water that I have just read, and the amount of electrical energy that I have just read,—what is the value of that service per cubic yard of gravel recovered?

A. A very minimum of 10 cents per cubic yard. The plant would have to be very efficient.

Q. Would that vary to any extent, Mr. Morrison, where a portable plant was used?

A. Yes, it would vary. Your costs would come down from three to five cents.

Q. Then it would have a value of five to seven cents per cubic yard?

A. That is correct.

Q. To have that work done for you, and that water furnished, on a portable plant?

A. That is correct.

Q. Now, is it possible, Mr. Morrison, to operate a portable plant in connection with a sand and gravel plant, the primary purpose of which was the recovery of clean sand and gravel, suitable for concrete aggregates?

A. It would be entirely possible, yes. If a plant were designed to work in conjunction with it. The contractor already had a plant with a capacity of 250 yards [110] per hour, and that was the thing that got us into trouble, because he insisted

(Testimony of William Harlan Morrison.)

that was the plant he was going to install there.

Q. In the recovery of the gold, or in carrying out the provisions of the contract that you and the engineers had discussed, was it possible for you to recover a substantial portion of the gold with the gallons of water per minute and the electrical energy per minute, or sufficient electrical energy to be delivered for efficient operation, and the vertical drop provided in conjunction with the handling of the gravel, with a plant of 250 yards capacity per hour?

A. Positively not, because the limitations were left out of the specifications.

Q. Then the limitations that you testified was discussed of 100 yards per hour was not placed in this contract?

A. That is correct.

Mr. McMillan: Are you contending that there was a contract reduced to writing?

Mr. Cornish: No.

Mr. McMillan: You are simply now attempting to show the negotiations between the parties?

Mr. Cornish: To show that there were negotiations; that certain materials and matters were discussed; and that because of the turn of events it was impossible for the defendant to meet these conditions, because the contractor was not limited by the Government as to the rate at which he could take sand and gravel and, consequently, it was impossible for the defendants to recover the gold and comply with the specifications, namely, that they should not impede the substantial recovery of

this plant. That at the time it was understood the parties contemplated the taking of 100 yards per hour, and it developed, after the contract was let, and after the suit was filed, that the contractor [111] intended to use a plant that produced 250 yards per hour, as distinguished from one that produced 100 yards per hour.

Mr. McMillan: But no plant was ever set up, was it?

Mr. Cornish: No, no plant was ever set up.

Q. You and your associates have been connected with this property how long, Mr. Morrison?

A. Ten years.

Q. And you are familiar with the location and the boundaries and the controls of the property?

A. Very much so.

Q. What acreage of the entire 40.34 acres, Mr. Morrison, is gold-bearing gravel?

A. Approximately 30 acres in both bars.

Q. Thirty acres? A. Yes.

Q. Is all of that 30 acres exposed gravel?

A. Oh, no; no. The channel of the river is gravel.

Q. That 30 acres includes the bed over which the water of the river flows? A. Yes.

Q. That is gravel, as well as the portion above the water? A. Yes.

Q. And that 30 acres includes that portion of the bar up above, which is under the hill?

A. That is not taken into consideration at all.

Q. In other words, that portion on which you

(Testimony of William Harlan Morrison.)

ran this drift of 56 feet in length is not included in that 30 acres? A. Not at all.

Q. What portion of your 30 acres, Mr. Morrison, is on the inside of the bend, and what portion is on the outside, or on the south end of the property?

A. I can only approximate, but I would say 20 to 21 acres in the large, or the east bar, and nine or ten acres on the west side.

Q. In your judgment, Mr. Morrison, was it possible to mine the bar on the south end of the property at the same time that gravel [112] operations were taking place on the inside of the bend?

A. With ease. It would be the proper place to work, in fact.

Q. Would such an operation have in any way interfered with the removal of concrete aggregates from the bar on the inside of the bend?

A. I don't think it could possibly interfere.

Mr. Cornish: You may cross examine.

Cross Examination

Mr. McMillan: Q. Mr. Morrison, during these negotiations, the quantity of gravel that it would be necessary to take in order to get the concrete for use in construction of the dam, what quantity was discussed?

A. From 70,000 to 100,000 yards, if I remember correctly.

Q. But never above that at any time?

A. Oh, yes, it was. Indefinite.

(Testimony of William Harlan Morrison.)

Q. Do I understand your testimony to be that there was never any discussion of a definite nature as to the required amount of concrete aggregates that would be required in the construction of the Ruck-a-Chucky Dam?

A. Did you understand that?

Q. What was your answer?

A. It was my understanding that it should.

Q. What was your understanding during these negotiations?

A. During these negotiations, the damsite was discussed, and the requirements were estimated roughly at 70,000 to 100,000 yards of concrete aggregates, and after that time the damsite was moved; I was not able to get anyone to give me an estimate——

Mr. McMillan: I move that that be stricken as not responsive.

The Court: It will be stricken.

Mr. McMillan: Q. Now, Mr. Morrison, I understood from you that after your application had been made for a patent in this case, you transferred your interest.

A. That is correct. [113]

Q. Did you transfer your interest after you had made the test with reference to the quantity of gold in that gravel?

A. No. That transfer was for the purpose of convenience in obtaining a patent and protecting the original locator.

Am I correct in answering the question in that

(Testimony of William Harlan Morrison.)

way? I have always had the management, but the legal part of it was transferred to Mr. Miedel and Mr. and Mrs. O'Connor for the purpose of obtaining the patent. Miedel and Associates are partners, who have the title to the property.

Q. Haven't you an interest in the property?

A. A lease only. The title stands in the name of R. J. Miedel and Mr. and Mrs. O'Connor.

Q. What is the duration of your lease on the property?

A. For the duration of the war, I suppose; it is indefinite.

Q. That lease was entered into when?

A. Long before the discussions with the engineers' office. I would have to go back to my notes to give you an accurate answer.

Q. Have you a written lease?

A. Yes, sir; there is a written lease.

Q. For what term, please?

A. A five-year term.

Q. Beginning when?

A. I should say sometime in 1935.

Q. That has expired, has it not—the term?

A. No, it has not. It has been extended by agreement.

Q. By written agreement?

A. I think counsel will bear me out on that. I think that has all been taken care of.

Q. Do you know whether it has or not?

A. Not positively.

(Testimony of William Harlan Morrison.)

Mr. Cornish: Mr. McMillan, the leases are all attached to the——

Mr. McMillan: I have the witness in hand now.

Mr. Cornish: I object to the question upon the ground that [113a] the written lease is the best evidence.

Mr. McMillan: I am trying to find out from this witness,—and not from Mr. Cornish—not only his interest in the property, but also his interest as a witness.

The Court: Overruled.

Mr. McMillan: Q. You say you have a written lease, which was extended. It was extended from what time? A. I don't remember.

Q. You said you thought it had not expired.

A. It has not expired.

Q. And you know the consideration for the lease. A. Yes, I do.

The Court: Q. Is it on file?

A. It is attached to these papers, somewhere.

Mr. McMillan: Q. What papers?

A. A copy of it is attached to our answer.

Mr. Cornish: All the lease defining the rights of the parties are attached to the answer and marked as exhibits.

Mr. McMillan: Q. When did you first become interested in this property, Mr. Morrison?

A. In 1932, before the road, or the bridge, was built.

Q. When did you first hear of the Ruck-a-Chucky project?

(Testimony of William Harlan Morrison.)

A. About a year prior to the conferences with the engineers.

Q. That would be about what time?

A. The Act was passed in 1935.

Q. You had never been advised of U. S. Rivers & Harbors Committee Document No. 50 prior to that time?

A. I think not; I think not. I may have known it sometime in May or June of that year, because there was some question about title at that time.

Q. Some question about what title?

A. Our title.

Q. In what regard?

A. Oh, a little matter of claim-jumping. [113b]

Q. Sir?

A. A little matter of claim-jumping. There was an adverse title suit along about that time.

Q. Claim-jumping when? A. In 1934.

Q. That property up there had been withdrawn from entry in 1928, had it not?

A. Technically, yes.

Q. And it was reopened when, for the location of mining claims?

A. I would say it was reopened sometime in the early part of 1934, or maybe in the latter part of 1938.

Q. Was it not in August, 1938?

A. Possibly.

Q. What interest did you have in that property at the time it was reopened for entry?

(Testimony of William Harlan Morrison.)

A. I had machinery on the ground and was working.

Q. You didn't expect at that time, as the situation stood, to be able to make an application for a patent, did you, before it had been reopened?

A. No.

Q. Who was interest with you in the property?

A. At that time one of the very men who are today interested, and the Crone brothers were, whom we later bought out.

Q. When did you first set up some machinery there for the purpose of mining that property?

A. Just prior to its restoration.

Q. What is that?

A. Just prior to restoration to the public domain.

The Court: Mr. McMillan, it is now recess time.

(Recess.) [113c]

The Court: You may proceed, gentlemen.

Mr. McMillan: Q. Now, Mr. Morrison, are you prepared to state that you didn't know of the contemplated construction of the Ruck-a-Chucky Dam prior to the Act of Congress of 1935, that there were discussions, and that there were public documents and surveys made by the State and the California Debris Commission, and House documents of Congress recommending that sites be put up there on the Upper Narrows and other places in California, in furtherance of hydraulic mining?

The Witness: May I have the question again?

The Court: The reporter will read the question.

(Question read by the reporter.)

(Testimony of William Harlan Morrison.)

A. No.

Mr. McMillan: Q. Never heard of any such thing? A. No.

Q. No one ever told you anything about it?

A. No. May I clarify it? I think you misunderstood my answer. I said I am not prepared to state I knew these things were going on, but—

Q. Did you have any definite information in respect to it?

A. Only that which appeared in the newspapers. I presume I did know what was going on in the newspapers.

Q. Yes. And it was thought that the dam would be put on the Middle Fork of the American River, the Ruck-a-Chucky Dam, is that correct?

A. Yes. I can tell you when I learned about it. When they started construction on the North Fork Dam. Now, if someone knows the date of that, that is when I learned about it.

Q. And the time you became interested in that property was in 1932?

A. 1932; that is correct.

Q. Then you pursued that interest until 1934, when mining machinery [114] came in there?

A. That is right.

Q. Did you purchase the machinery, or who purchased the machinery that went in there in 1934? A. My associates and I.

Q. What?

A. My associates and I, a partnership. May

(Testimony of William Harlan Morrison.)

I explain, your Honor? May I explain how we got in there?

The Court: Just answer the question.

Mr. McMillan: Q. That machinery cost you how much?

A. The original installation, perhaps eight or ten thousand dollars. I am not prepared to say now.

Q. Was the full extent of the use of that machinery, your mining, just what you testified to here today?

A. I don't know what you are referring to. I testified to——

Q. What use did you make of the machinery?

A. Set up a dragline.

Q. That is the only one you set up?

A. At that time.

Q. Or any other time, with that machinery?

A. Yes, we put in other work from time to time.

Q. What other work?

A. We have spent a great deal of money there——

Q. Did you do anything besides spending money?

A. Yes, indeed; a great deal. We did our assessment work. Yes, indeed.

Q. Did you make any tests on the property beyond the three tests you have testified to this morning? A. Yes, sir.

Q. With reference to time, when?

A. Each summer I spent time there.

(Testimony of William Harlan Morrison.)

Q. That was for the purpose of doing location work, wasn't it?

A. Not always, no; assessment work. Assessment work requires 10 feet of tunnel, 10 feet of shaft, or an equal amount of surface work. [115]

Q. Other than that drifting and shafting, the work that was done in furtherance of doing the assessment work, did you do any other work?

A. Oh, yes, indeed.

Q. What?

A. The north drift, the 56-foot tunnel, was an exploration tunnel to learn what happened to the bedrock, to see if it remained the same; we thought it might dip down and reveal a channel.

Q. And you aided in the preparation of the application for a patent in 1938, did you not?

A. I don't understand.

Q. The application was made in 1938 for a patent, I think it was, for this mining claim. Did you assist in the preparation of that application?

A. I don't recall for certain.

Q. You don't recall definitely?

A. I think I was asked some question.

Q. At that time you were interested in this claim? A. That is right.

Q. But you assigned your interest in it afterwards, is that true?

A. No—I am not prepared to tell you the date of the assignment, because, as I say, it was a matter of convenience——

Q. Did you assign your interest in this patent,

(Testimony of William Harlan Morrison.)

or your claim to this mining property, prior to the payment of the money to the Government on the application for the patent?

A. I am not sure. I don't really know that——

Q. Did you pay any portion of that money?

A. I don't really know when that money was paid.

Q. Well, that money was \$2.50 an acre, wasn't it?

A. Yes.

Q. And do you remember when the patent was issued?

A. No. It was after the condemnation suit.

Q. Yes. Now, during the course of these negotiations that started, [116] we will say more than a year before the condemnation suit was brought, during the course of your discussions and negotiations, oftentimes the question of title came up, did it not, in discussing these matters with Mr. Hjelm and others as to the title of this property, and the patent had not yet issued?

A. Yes, sir, that is right; there was some discussion regarding title.

Q. You didn't expect any money to be paid under these negotiations until the title matter had cleared up, did you?

A. No, nor at any time——

Q. Now, isn't this a fact, Mr. Morrison: that during all your negotiations with the Government—and I am prepared to say the same with reference to you folks—these negotiations were all being conducted in good faith, is that true?

(Testimony of William Harlan Morrison.)

A. Absolutely, as far as I am concerned.

Q. You said that after this complaint was filed, these specifications were then called to your attention, and you found they were drawn up in such a way that they were backwards——

A. Yes; they were just reversed.

Q. Isn't it a fact that is an exact copy of the specifications that were furnished in a letter by Mr. Cornish to the United States Attorney?

A. No; it was reversed. It may have been a typographical error, but it was reversed.

Q. Well, he furnished the specifications, did he not, to the United States Attorney, before the complaint was filed? A. Perhaps.

Q. Well, do you know?

A. I don't know.

Q. Let me ask you: You said you were talking to a representative of the contractor after this condemnation suit was brought.

A. That is right. [117]

Q. And you have introduced in evidence certain photographs that you took at that time.

A. That is right.

Q. Why were you concerned at that time about taking photographs?

A. If you were the manager of an enterprise, wouldn't you be——

Mr. McMillan: Just a moment.

I ask that that be stricken out as not responsive.

The Court: It will be stricken.

(Testimony of William Harlan Morrison.)

Mr. McMillan: Q. What caused you to take the photographs?

A. As the manager, I felt it my duty to do so.

Q. They were taken at that time, were they?

A. Absolutely.

Q. Did you ever do any mining on Sweetwater Creek up in El Dorado County? A. No.

Q. What was the character of your mining in El Dorado County? A. El Dorado County?

Q. Yes. Did you do any mining up there in El Dorado County?

A. Yes; on this property.

Q. On this property? A. Yes.

Q. Not on any other?

A. Not on any other.

Q. And the extent of your mining in Placer County is limited to this particular property?

A. Not Placer County, but El Dorado County.

Q. El Dorado and Placer County, isn't it?

A. There is a difference of opinion there. We believe it to be in El Dorado County.

Q. None of it in Placer County?

A. I wouldn't be prepared to argue it with you. I believe there may be a small corner in Placer County.

Q. How many years were you up in Alaska mining? A. Three years.

Q. What was the nature of your mining up there?

A. Gold mining, with the exception of one winter. [118]

Q. Let me ask you this: Were you actively en-

(Testimony of William Harlan Morrison.)

gaged in mining during this period you have testified to? A. Absolutely.

Q. What became of your jewelry business?

A. I wasn't in the jewelry business.

Q. You testified on your direct examination that you were in the jewelry business for 40 years. What happened to your jewelry business when you were——

A. I learned the trade when I was a youngster. I was in the jewelry business at various times, I said, for 40 years. I was an apprentice 40 years ago.

Q. At the time you were interested in this property we have here under consideration you were in the jewelry business?

A. Are you asking me a question?

Q. Yes. A. What was the question?

Q. Were you in business in 1934?

A. Yes, sir.

Q. Where? A. Berkeley.

Q. And you have continued in that business there continuously since, is that correct?

A. Precisely. I have two sons that take care of the business, and I can come and go as I like.

Q. It doesn't give you much time to do mining, does it?

A. It hasn't since the war. Before the war, yes.

Q. What mining have you done?

A. I have produced more chrome and magnesium than any man in America for the last war. It is a matter of record.

(Testimony of William Harlan Morrison.)

Q. I am talking about as connected with this property. I am holding myself to that as closely as I can.

A. Pardon me; I misunderstood you.

Q. You say you have done a great deal of chrome and magnesium and platinum mining?

A. Not platinum; molybdenum I said.

Q. Have you ever had any experience in platinum mining? [119]

A. Stream bed deposits, yes. That is all there is in this country.

Q. Is there a lot of black sand on this property?

A. Yes, quite a lot.

Q. You remember I called the Court's attention to an affidavit of yours, an affidavit in which you set forth there is 45,000,000 pounds of black sand up there?

A. I should like to see that. I think that is a typographical error, also.

Q. Of the value of \$1.00 a pound or more.

A. I should like to see that.

Q. I show you a copy of your affidavit which was filed in resistance to our motion to go on the property to make tests on there, on page 3 (exhibiting document to the witness and reading):

“In addition to said free gold, 1½ percent of the total deposit of gravel and sand on said real property is what is commonly called black sand; that said black sand contains platinum, irridium, and other valuable elements of the platinum group; that approximately 45,000,000 pounds of said black

(Testimony of William Harlan Morrison.)

sand is in said deposit, and said black sand has a value of \$1.00 a pound or more."

A. That is possible.

Q. Well, how did you arrive at that? What investigation did you make to arrive at that statement? It is not made on information or belief, but positively.

A. Much of our sampling revealed three percent of the total volume was black sand.

Q. Well, I mean the platinum and the chromium and the tungsten, and kindred minerals. How did you arrive at that?

A. In two ways.

Q. State them, please.

A. By determination, metallurgical determination, setting aside the various elements, precipitating [120] them, and learning what they consisted of, and then, by a firm in San Francisco who specializes in the purchasing and the working of that material,——

Q. Did you submit tests to them?

A. Positively.

Q. Did you not, some years ago, take a great quantity of black sand to the Selby Smelting Company to have tested?

A. Yes, sir.

Q. What was the result of those tests?

A. Do you know why?

Q. I am asking you what was the result of those tests?

A. You are speaking of a great quantity. Do you remember the quantity? It seems to me it was 900 pounds.

(Testimony of William Harlan Morrison.)

Q. What was the result of that test?

A. \$20.00.

Q. In other words, it wasn't enough to pay expenses, was it?

A. No; but that was a test. That was done to determine whether or not our recovery devices were doing their work, and——

Q. The most valuable thing you have in that property, in your opinion, would be the black sand?

A. Yes, at \$1.00 a pound.

Q. Yes. And 45,000,000 pounds you have up there?

A. No; that is an error.

Q. To what extent?

A. Perhaps one cipher.

Q. In other words, you maintain now that the value of that is \$4,500,000, and not \$45,000,000?

A. Something a great deal more reasonable.

Q. Well, do you contend that there is more gold up there than that?

A. Yes, if it is all recovered; yes.

Q. More than \$4,500,000?

A. If the black sand is \$1.00 a pound, obviously. Whether that market will stay or not I don't know.

Q. Mr. Morrison, you stated that there is about 30 acres there [121] of exposed gravel.

A. That is right.

Q. How many cubic yards would that be?

A. I must say to you that I employed a firm of engineers, Milborn Brothers, United States Min-

(Testimony of William Harlan Morrison.)

eral Surveyors. They surveyed the entire section for us at a cost of fourteen hundred odd dollars.

Q. Who is "us"? A. Milborn Brothers.

Q. No; "they surveyed it for us," you said. Who is "us"?

A. The same partnership, Miedel, R. J. Miedel, and associates.

Q. Milborn Brothers made the survey?

A. That is right.

Q. You never made the survey?

A. No; I caused it to be made under my supervision. I was there every moment of the time.

Q. And the result of that survey was what?

A. The result of that survey, when I asked to have the gravel surveyed, was a million, if my memory serves me, three hundred thousand yards.

Q. Now, as a result of your observations and your tests you have made on that property, what value do you place on that gravel up there, 1,300,000 cubic yards, a yard? What is the average value per cubic yard of that 1,300,000 cubic yards?

A. It would only be approximate, but it is much better than a dollar a yard.

Q. Much better than a dollar a yard?

A. Yes.

Q. Did you arrive at that valuation as a result of those tests to which you testified this morning on your direct examination? A. Yes.

Q. And upon that ground solely?

A. No; there have been other tests made there.

Q. I am speaking of tests made by yourself.

(Testimony of William Harlan Morrison.)

A. By myself, that is right.

Q. You have only made the tests to which you have testified in [122] this court this morning on your direct examination? A. Oh, no.

Q. On that property?

A. Oh, no; I have made many more tests on that. I have no notes on them any more, no log of the holes, or anything else, but I have done much more work than that.

Q. I understood you to testify awhile ago that sinking a shaft up there is better than using the drill method, drilling. A. That is correct.

Q. Because by sinking a shaft you can take out all of the material. A. That is right.

Q. Now, you sunk a shaft up there, did you?

A. Yes.

Q. I am referring to the one you testified to this morning. A. Two.

Q. Did you take out all of the material?

A. And placed it on the dump, yes.

Q. Sir?

A. Took it out and placed it on the dump and took a measured sample of the different levels, as I described.

Q. But you didn't test all of the material you took out, did you?

A. No. I didn't say I did. I wish you could see——

Q. But you did not? A. No.

Q. Now, in reference to that drag cut, when was that? That was when you had that machinery

(Testimony of William Harlan Morrison.)

in there? By the way, you lost that machinery, didn't you? A. Some of it.

Q. Most of it, didn't you? A storm came up there, and the water came up, and you lost most of that machinery, didn't you?

A. No; some we saved by getting it onto the bank ahead of time. We were a little late.

Q. Well, that is not always too safe up there to do, dredger mining, is that a fact?

A. No, that is not a fact.

Q. You can dredge up there all the year around?

A. Yes, all [123] through the year. In the winter time you can put your dredger against the bank.

Q. Have you had any experience in dredging with these things called doodle-bugs?

A. Sure. Bought one once upon a time.

Q. It is your opinion that you can, at any time of the year, safely take dredging machinery into that property?

A. That is my considerate opinion.

Q. It wouldn't be dangerous to go in there in the winter? A. No.

Q. Well, you lost your machinery.

A. Left it on the bar and lost it. I was mistaken. I didn't realize. Now, I have had the experience; it wouldn't happen again.

Q. Did you ever get any machinery after that?

A. Yes.

Q. To what extent did you get any machinery

(Testimony of William Harlan Morrison.)

after that and set it up in operation on the property?

A. Well, now, you say "after that." You mean after the——

Q. Loss of that machinery.

A. No, no serious attempt, because we had then entered into negotiations with the United States Engineers.

Q. When was that machinery lost?

A. I don't know the exact time; one of the highest storms.

Q. Well, that test that you made was in 1934, that dragline test, wasn't it?

A. That is right. It was lost subsequently, lost since that time.

Q. You never operated at all after that, did you?

A. I don't understand quite what you mean by operate.

Q. Did you ever operate any mining machinery up there after that? A. Yes.

Q. What was the extent and nature of that machinery? [124]

A. A mechanical pump to control the water.

Q. What was the cost of that?

A. Seven or eight hundred dollars.

Q. Who provided that machinery?

A. Myself.

Q. Entirely yourself. Did you lose it, too?

A. No.

(Testimony of William Harlan Morrison.)

Q. Did you ever recover any gold from this property and send it down to the Mint?

A. Yes, sir.

Q. What became of that gold that you sent down to the Mint?

A. Just what becomes of any other gold that you send down to the Mint.

Q. Have you got the reports on that?

A. No; that is in the office.

Q. What office?

A. R. J. Miedel and Associates.

Q. Well, it is quite important that you should have those tests when you are considering the valuation of that property up there, isn't it?

A. No, not at all.

Q. You didn't consider those reliable tests, did you?

A. Yes.

Q. Now, let me ask you this: Tell us just exactly what you did at the time that you cut that strip there, that cut. I think you took out 28,000 cubic yards, didn't you?

A. No.

Q. How much? What was the length and width of it?

A. Fan-shaped, approximately 300 feet long by 40 feet wide, the edges sloping in, because when you drag it out it caves. No attempt was made to measure it.

Q. No measurement whatever in yardage?

A. No testimony on it here; no report on it.

Q. Well, that is why I am trying to get the information, Mr. Morrison, because it was very

(Testimony of William Harlan Morrison.)

indefinite to me, and I am trying to clear it up now. You made no measurement of the yardage, did [125] you?

A. Perhaps I did at the time, but I preserved none of that.

Q. Kept none? A. No, sir.

Q. Well, on what did you base these reports that you had here this morning?

A. This is hand work below that cut. The log shows that, Mr. McMillan.

Q. But the log doesn't show the quantity of material that you took out, does it? A. Yes.

Q. The entire quantity of material?

A. They are all measured samples of $4\frac{1}{2}$ cubic feet and a cubic yard; every sample is measured.

Q. How long did that mining operation continue?

A. I didn't get the question. You mean the dragline plant?

Q. Yes.

A. That continued about three months.

Q. And these tests were made over that period of time?

A. No; these tests were made by myself. The dragline operation was when the Crones were in the organization.

Q. Now, let us take up the next tests. As I understand it, in the bottom of that cut you sunk a sump four by four cubic feet, is that correct?

A. That is correct.

Q. And you went down six feet, is that correct?

(Testimony of William Harlan Morrison.)

A. If I might refer to that log I could tell you accurately. Let's see; approximately six feet.

Q. That would be about 96 cubic feet, wouldn't it?

A. Perhaps.

Q. Huh?

A. Perhaps.

Q. All right. And you took five samples, according to your testimony?

A. That is right.

Q. That would be a cubic yardage of about 22½ feet, wouldn't it? These samples were in quantity of about 22½ cubic feet, [126] is that correct? Each sample, is that correct?

A. Each sample.

Q. Well, why didn't you sample all of it?

A. I was trying to get accurate figures on the measurement, and measuring them in a small bucket. We considered at that time, with those different levels, a 4½ cubic foot sample was sufficient.

Q. Didn't I understand from your testimony that you had a great deal of water trouble at that time?

A. That is correct.

Q. Well, isn't one of the great advantages of sinking a shaft that you keep the water out?

A. You keep it out with pumps, yes.

Q. Well, if you sink a shaft, and the water seeps in, and you have water trouble, by reason of specific gravity, the weight of the gold, the gold gets in there and it sinks to the bottom, doesn't it?

A. No.

Q. None of it gets in?

(Testimony of William Harlan Morrison.)

A. No, I wouldn't say none of it gets in.

Q. In other words, if you sink a shaft, and on account of water conditions leave that shaft open for an extensive period, no gold will come in from the outside?

A. This was not left for an extensive period.

Q. How long did you leave that shaft there?

A. Only overnight. It was running continuously, and I think the work took four or five days, maybe six days.

Q. You worked four or five days on the shaft?

A. That is right.

Q. And you took five samples?

A. Yes, sir.

Q. $4\frac{1}{2}$ cubic feet for each sample?

A. Yes, sir.

Q. And it was a cut four by four feet, is that correct?

A. Yes.

Q. And you went down six feet?

A. That is right. [127]

Q. Why didn't you sample the rest of it?

A. I think I testified a moment ago I felt the $4\frac{1}{2}$ cubic foot sample was sufficient, and there was considerable labor involved in working on a small table——

Q. Well, you tested by taking samples at random, didn't you?

A. No.

Q. Didn't you testify there was a drift that ran back under the hill 56 feet?

A. That is right.

Q. Didn't you start in and take a sample there

(Testimony of William Harlan Morrison.)

where you started the drift, and then go in for a distance and take a sample, and in one place in a crevice you found some gold in good quantity——

A. No; just one little nugget.

Q. Is it an extraordinary thing for a nugget to get under a boulder?

A. Not an extraordinary thing for a nugget to get under a boulder, no; that is what it would do.

Q. And that is what happens, isn't it? Among mining men that is not considered a fair test?

A. Is it?

Q. I am asking you. Among mining men that is not considered a fair test?

A. Yes, sir, it is a fair test.

Q. Isn't it considered a fairer test by mining men that when you are running a drift or shaft and you hit a sample that runs unnaturally higher than the rest to throw it out?

A. You certainly would not throw it out.

Q. It doesn't make any difference how hot it is, you throw it in with the rest and average them all up together?

A. What do you mean by "hot"?

Q. Well, you say you are a mining man. That is a common locution among mining men.

A. It depends on what one's instructions are. If you were mining for yourself, you would take all the gold you found there, and you would want to make the test to [128] satisfy yourself——

Q. Were you making the test to satisfy yourself, or were you making the test because—. As I

(Testimony of William Harlan Morrison.)

understand, there was some trouble up there, and you wanted to get at the bottom of it. What were you making the test for?

A. I repeat the testimony I uttered this morning: In order to justify the spending of my money as well as my associates' money, and I certainly wouldn't throw away a good nugget to knock the value down, nor would I include a thing I felt should not be included.

Q. Well, then, in fairness to your associates and to yourself you believed, then, that it would be proper that when a hot test showed up, an unusual one, and you found a nugget of gold behind a boulder or in a crevice, that that should be added up and divided up with the other tests made, is that true?

A. If you were seeking an average, I would say no.

Q. Now, tell us a little more about that drift under the hill, that tunnel that was under the hill. How deep did that go in there?

A. The distance?

Q. Yes. A. How deep down?

Q. Yes.

A. Well, when it goes into the bar it is 21 feet from the collar.

Q. And how wide?

A. At that time it was six by six.

Q. How far back did it extend into the hill?

A. 56 feet.

(Testimony of William Harlan Morrison.)

Q. And the entire distance under that hill is about a hundred feet, isn't it?

A. I don't understand what you mean.

Q. What is the distance under the hill?

A. To our line, you mean?

Q. Yes. A. It is 156 feet.

Q. Then there is a hundred feet more under the hill?

A. That is right, but the only samples I submitted are for the [129] first—

Q. How many samples did you take?

A. Five, four of which are in that drift extending over a distance of—let me see—15 feet, my theory being that is as far as it would be feasible for a dragline or bucket line scraper to go, and the rest, I was looking to see what happened to the bedrock, or whether we had a channel in there.

Q. You didn't take that test as determinative of whether or not to advise your associates to do thus and so, did you? A. This last test?

Q. Yes.

A. No. I think I testified that was assessment work.

Q. As a factor and an element in determining in your own mind as an expert the recoverable gold in the entire acreage, you threw that out, didn't you? A. Precisely.

Q. That cut no figure at all?

A. Well, the difference between 15 and 56 feet. The 15 feet is ground that can be dredged with a doodle-bug.

(Testimony of William Harlan Morrison.)

Q. Yes. And if you kept on mining under that hill, the hill would come down on you, wouldn't it?

A. There was no thought of mining in the hill. We only owned 156 feet of it.

Q. Anyone undertaking mining operations in that hill there would be in very grave danger of having the hill coming down on him, would he not?

A. It would depend on what kind of a miner he was.

Q. You wouldn't expect the United States Government, in taking concrete aggregates, to go under that hill, would you?

A. I haven't discussed that at all.

Q. Well, would you, in your judgment?

A. Oh, no, of course not. Of course not.

Q. Mr. Morrison, after 1934, when you lost that plant, why did [130] you abandon the mining of that property for so many years?

A. Never at any time was it abandoned.

Q. Well, did you set up equivalent mining operations after that?

A. Was it necessary? No.

Q. Just let it remain idle?

A. No, it didn't remain idle.

Q. You never leased it, did you?

A. No; had no intention of doing so.

Q. Did you ever make any effort to have it dredged on a royalty basis?

A. I purchased a dredger, but dropped the idea when we began these negotiations.

Q. Whom did you purchase a dredger from?

A. Through the Pan-American Dredging Com-

(Testimony of William Harlan Morrison.)

pany. It was a dredger which had just finished an operation over in the county.

Q. What did you pay for it?

A. I didn't pay for it.

Q. Oh, you didn't pay for it?

A. We had a contract to buy it, and when the negotiations were started we asked them to cancel the contract.

Q. Just when did you ask them to cancel the contract? A. I couldn't say that.

Q. Near what time?

A. I could ascertain that from correspondence, but I haven't it with me.

Q. About what time, as close as you can arrive at it?

A. I believe around April or May, 1939.

Q. Up to that time you had done nothing?

A. I don't understand why you persist so about doing nothing.

Q. I am talking about having set up machinery and having a going enterprise in the way of mining that property. You never did, did you?

A. I don't understand the question, Mr. McMillan.

Q. Did you ever set up, after 1934 or 1935, any mining machinery, [131] and operate actively that property? A. Yes, yes.

Q. What was that? That \$900 investment?

A. Yes, that is one of them. Another was a small dragline, which was considered nothing in the world but a test to see whether the values ran

(Testimony of William Harlan Morrison.)

somewhat uniformly, and we ascertained that to our own satisfaction.

Q. What was the contract price on this dredger?

A. Twenty-eight thousand odd dollars.

Q. Forty-eight thousand?

The Reporter: Q. Did you say twenty-eight thousand or forty-eight thousand?

A. No; he is putting words in my mouth again. No; twenty-eight thousand.

Mr. McMillan: Q. Mr. Morrison, in your opinion is that the proper way to mine that property, to dredge it?

A. Precisely.

Q. Sir? A. Precisely.

Q. The most practicable? A. Precisely.

Q. The most logical? A. Yes.

Q. Then why didn't you do that long before?

A. (Witness laughs.)

Q. You had an investment of \$10,000, and you had other investments there. Now, at this late stage in 1939 you were prepared to get a dredger for \$28,000.

A. That is correct. None were available before that time at a price we felt justified to pay.

Q. The doodle-bug became popular about that time, 1934 or 1935, didn't it?

A. No, it was not practical until 1938, and that will be borne out——

Q. About that time, 1934 or 1935, there was a great deal of [132] excitement in the mining of gold on account of the price, \$31.00 an ounce?

(Testimony of William Harlan Morrison.)

A. That is correct.

Q. And about that time they started in with these doodle-bugs, and later on perfected them?

A. That is correct. They weren't considered a success until——

Q. Did the Government ever take any of the gravel on this property for use—— A. Yes.

Q. (continuing) ——in the construction of that dam?

A. I don't know for what use it was taken, but some was taken, and I have been told——

Q. I am asking you of your own knowledge.

A. Yes, I saw it leave.

Q. How much?

A. Oh, I don't know; several truckloads of gravel was taken. I think it was used for an abutment, but I didn't see it done.

Q. You don't know that? A. No.

Q. And you don't know how much was taken, but it couldn't be beyond that several truckloads?

A. No.

Q. Now, this machinery was never set up on the property to which you testified this morning that negotiations were going on for the setting up of, certain machinery for the recovery of gold? There was nothing set up, was there?

A. What?

Q. In your negotiations certain machinery was to be set up, certain gravel was to be fed into it, and you were to recover the gold and the tailings

(Testimony of William Harlan Morrison.)

given back to the Government. That was never done, was it?

A. No. Do you know why? Do you want me to tell you why?

Q. No. I am asking you if it was done.

A. No.

Q. Now, besides taking the gravel there, the Government did [133] exercise some use of that property in the way of putting in a road?

A. No road.

Q. But they did put a power line in there?

A. That is right.

Q. So they made some other use besides the contemplated use of also taking gravel and sand, is that correct? Why hesitate on that, Mr. Morrison? You were testifying a little while ago as to setting up some poles, power lines.

A. I see no sensible answer to your question. After having been excluded I have no notion what they did there.

Q. I understood from your testimony you testified, and you produced pictures in support of your testimony, that certain poles were put in there.

A. That is correct, and that was done prior to the condemnation suit.

Q. And nothing was ever done after the condemnation suit was filed, is that correct?

A. Oh, no, there was work done there.

Q. Do I understand from your testimony with reference to the pictures you have introduced in evidence, and also in reference to these power lines,

(Testimony of William Harlan Morrison.)

they were set up before the condemnation suit was brought?

A. Not in their entirety, but they started before the condemnation suit was filed.

Q. Will you tell us what took place after the condemnation suit?

A. I can't say to save my life.

Q. You don't know whether anything was done, do you?

A. Oh, yes, I know things were done——

Q. Your testimony as to what the Government did in connection with taking possession of that property had to do with all things that took place before the condemnation suit was filed, is that correct?

A. Wouldn't you say that things were done [134] after the——

Q. Mr. Morrison, I am asking you a very specific and clear question that is susceptible of an equally specific and clear answer.

(Question read by the reporter.)

Mr. McMillan: I will reframe the question.

A. Do that, please.

Q. For your better understanding. You introduced in evidence this morning certain photographs showing oil drums and trees that were stripped for the purpose of running power lines on them. Now, when were those pictures taken?

A. I think the testimony will show——

Q. Well, may I have your best recollection on it?

(Testimony of William Harlan Morrison.)

A. That was on the day of my conversation with Mr. Hoops.

Q. Was that subsequent to the filing of the condemnation suit, or before?

A. No, it was subsequent.

Q. The pictures were taken subsequent?

A. Yes.

Q. Now, did that condition which these pictures reflect exist prior to the filing of the condemnation suit? A. I am informed that it did.

Q. Then, what was done then was done before the condemnation suit was filed?

A. Without my knowledge and without permission.

Q. Sir?

A. Without my knowledge and without permission, under protest of the men I had on the property at that time.

Q. Then some person was a trespasser on that property? A. That is right.

Q. And not the United States Government?

A. That is right; your contractor, Mr. Pollock.

Q. But not the United States Government?

A. Well, a representative of the Government.

Q. Because you saw the poles and all this work depicted in the pictures before the suit was filed.

A. No, you misunderstood me.

Q. I thought that was what your testimony was.

A. I may have given you the wrong impression, unintentionally on my part. You wouldn't see the lines there on the trees in the pictures——

(Testimony of William Harlan Morrison.)

Q. That is true, but were they on there before the condemnation suit was filed?

A. I don't know.

Q. Will you testify they weren't put up there until after the condemnation suit was filed?

A. Perhaps that is correct.

Q. I am asking you if it is correct now or not.

A. I was informed they went in there with their materials before the condemnation suit was announced to us. What date it was, I couldn't tell you the date.

Q. You want your testimony to stand to that effect? A. I do.

Q. When was that gravel taken?

A. Subsequent to the condemnation suit.

Q. How long after?

A. Oh, several weeks, I imagine.

Q. Then the only thing that you know of your own knowledge that the Government did after the condemnation suit was filed in the way of taking possession was to take the gravel, is that correct?

A. Well, I am not sure, Mr. McMillan, that this is the right place to answer that question. I do know of many things that developed——

Q. When was that talk about setting fire to that house?

A. Oh, a week or two, perhaps, after the taking of possession.

Q. Well, it was never set afire, was it?

A. No.

Q. Who told you to set fire to it?

(Testimony of William Harlan Morrison.)

A. Nobody. [136]

Q. Was there some suggestion of burning it down?

A. That was Mr. Hoops' suggestion, that it would be the easiest way of getting rid of it.

Q. Do you think the Government would be bound by an act of that kind?

A. If performed by its agent, yes.

Q. Do you believe the Government is responsible for the wrongful acts of its agents?

A. After taking possession——

Q. I am just trying to get clear, Mr. Morrison, after those poles were erected, whether those trees were stripped, and whether the wires were laid, before the suit was filed?

A. Well, I frankly don't know.

Q. Name some of those persons—you said there were a number of persons that wanted to lease this gravel, or purchase this gravel from you. Who were those persons?

A. One, a man by the name of Stagg, who is the owner and operator of several dredging operations; he is one.

Q. When was that?

A. That was at the time it was under condemnation. Just when I couldn't say.

Q. After the condemnation suit was filed?

A. That is right. That is right. My reply to him was we were under condemnation and couldn't deliver title, and therefore we would have to discuss it some other time.

(Testimony of William Harlan Morrison.)

Q. Now, who else? Who else?

A. I am trying to think of his name.

Q. You said there were several.

A. He has an enormous dredger. He operates in Northern California. I will think of his name in a moment. Then there was a man brought to us by the Pan-American Dredging Company. His name I never did learn.

Q. When was that?

A. That was a year or more ago.

Q. Well, after the condemnation suit was filed?

A. That is [137] right. And prior to that there have been a number of negotiations. Mr. Taylor, who at that time was operating the Hines-Gilbert Mine.

Q. That was about when?

A. Oh, a year before the condemnation suit.

Q. Did you ever enter into a contract?

A. Naturally not. I planned to operate it myself. That is no crime.

Q. In disposing of that gravel you had always in mind, did you not, that it was gold-bearing?

A. Let me get the question. In disposing of it?

Q. Yes. If a man came to you to buy that gravel on that property up there, would you sell it as gravel, or as gold-bearing gravel?

A. If he permitted us to extract the gold, he could buy the gravel; otherwise not.

Q. As I understand, in your contracts you had with these persons, or these contracts you sought to have, or persons desired to get gravel from you,

(Testimony of William Harlan Morrison.)

that you had an understanding to that end, that is, the only way they could get the gravel was to permit you to get the gold?

A. That is correct.

Q. Was that your understanding with these prospective purchasers?

A. Prospective purchasers?

Q. I understood from your direct examination that you had a number of opportunities to sell that gravel, is that right?

A. I think you misunderstood me. People came to us wanting to buy it, and as I understand, a number of people wanted to lease it, and a number of people wanted to get a bond and option to buy on a royalty basis.

Q. On a royalty basis? A. Yes, sir.

Q. That, Mr. Morrison, wouldn't be a sale of gravel; that is a mining operation, isn't it?

A. Well, —

Q. Not a sale of gravel?

A. Did you understand me to say I [138] was selling gravel? We have all along maintained we are not in the gravel business.

Q. I am sorry to say that is my understanding of your response to the questions your counsel asked you. You have never had any gravel to sell to anyone, is that right?

A. We have sold a small amount of gravel, yes.

Q. How much?

A. I would say about 20 yards to one of the mines up there for concrete foundations.

(Testimony of William Harlan Morrison.)

Q. But you have no gravel for sale in large quantities? A. That is correct.

Q. Never had any for sale in large quantities?

A. I just testified we had some for sale if——

Q. But you wouldn't sell it——

A. Without removing the gold, no.

Q. Did you ever make any tests on that property of your own by drilling, drilling tests?

A. Not personally; not personally.

Q. Are you familiar with making tests in that manner? A. Absolutely.

Q. Do you know of any piece of property in your entire experience outside of Alaska of like quantity, gravel property that carries the gold content to which you have testified today with reference to this property?

A. I know of no other or I would own it.

Q. You don't own this, do you?

A. A share of it, yes.

Q. Sir? A. A share of it, yes.

Q. But do you know of any such property outside of this?

A. There are none left. They have all been dredged except this one. This one has never been dredged.

Q. Would you say this property has not been dredged or mined at any time?

A. I am in a position to prove that it has [139] not been dredged. It has been mined to a certain extent, but it has never been dredged.

(Testimony of William Harlan Morrison.)

Q. Are you in a position to prove that in the early days, in 1878, there was not on that Spanish Bar there, thousands of men carrying on mining operations?

A. Legend has it in the Gulch above, not on the Bar.

Q. Before that, in 1848 and 1849, isn't it a fact that the first million dollars ever taken off any mining operation was up in that country?

A. In that country, yes, but not on that property.

Q. Not on your property?

A. That is correct.

Q. Isn't it true that the Chinamen came after that, up there in that country, and worked over those bars in their thorough way?

A. That is correct.

Q. But no Chinaman ever mined on your property?

A. To some extent, yes.

Q. But that is the extent of the mining on your property?

A. That is right.

Q. And that is practically virgin gravel, then?

A. Much of it is, to my knowledge.

Q. None of it has been pillaged by any operations?

A. No, sir.

The Court: It is adjournment time. We will adjourn until tomorrow morning at ten o'clock.

(Whereupon an adjournment was taken until Thursday, November 18, 1943, at 10:00 o'clock a. m.) [140]

Thursday, November 18, 1943

10:00 o'clock a. m.

The Clerk: United States versus 40.34 acres of land.

Mr. McMillan: Ready.

Mr. Cornish: Ready.

The Court: You may proceed, gentlemen.

Mr. Cornish: You want to continue your cross examination of Mr. Morrison?

Mr. McMillan: No further cross examination.

Mr. Cornish: Mr. Morrison, will you take the stand, please?

WILLIAM HARLAN MORRISON,

recalled for the defendants; previously sworn.

Redirect Examination

Mr. Cornish: Q. Mr. Morrison, in Mr. McMillan's questions he asked you concerning any tests you had made on this property other than the two, the shaft and the drifts of which you testified. To what extent, if any, have you made tests to determine the gold-bearing content of the surface gravels of that bar? And I refer now to the bar on the inside, the El Dorado Bar.

A. Many pan tests, measured samples were carried down to the laboratory and worked on, to satisfy ourselves that we weren't spending our money needlessly or uselessly.

Q. And what did your tests of the surface gravels indicate as to the gold content?

(Testimony of William Harlan Morrison.)

A. You refer now to the surface gravels down to the clay seam, or——

Q. The panning test, just off the surface of the bar.

Mr. McMillan: Well, may it please your Honor, that calls for an opinion of the witness, and you must have better evidence.

Mr. Cornish: Withdraw the question. [141]

Q. And what did your panning tests of the gravels on the surface of the bar show as to gold content?

A. 25 to 35 cents a yard.

Q. 25 to 35 cents a yard?

A. But it must necessarily go that much or you couldn't see the sample; it wouldn't be enough to see——

Mr. McMillan: I ask that that be stricken out as a conclusion of the witness.

The Court: It may go out.

Mr. Cornish: Q. On each of these pan tests that you took of the surface gravels, after you had panned the gravel down to the concentrates you mean you were able to see gold?

A. Precisely.

Q. Free gold? A. That is right.

Q. Now, Mr. McMillan also asked you concerning the sale of gravel on that bar. Do you know what, if any, sales of gravel have been made in the last five years, of gravels from the El Dorado Bar?

A. Perhaps 20 yards. I didn't measure it myself, but a report from a man we had on the ground showed about 20 yards——

(Testimony of William Harlan Morrison.)

Mr. McMillan: Object to that as not the best evidence.

The Court: No, it is hearsay.

Mr. Cornish: Q. What price was paid, Mr. Morrison, for the sale of the gravel, and on what terms? A. \$2.00 per yard, cash.

Q. \$2.00 per yard. And you say that 20 yards was sold? A. Yes.

Mr. Cornish: That is all.

Recross Examination

Mr. McMillan: Q. When was this 20 yards sold, Mr. Morrison?

A. I am not sure that I could fix the exact date, because I haven't with me the report. It was just prior to the taking of [142] possession by the Government Engineers.

Q. To whom was it sold?

A. The Hines-Gilbert Company—not the Hines-Gilbert Company, the Slaggard Mining Company.

Q. For what purpose, Mr. Morrison?

A. I understand it was to be used as an engine foundation at the tunnel mouth.

Q. It was a small quantity of 20 yards, is that correct? A. That is my testimony.

Q. Easily transportable?

A. Well, if one carried it on his back it might—

Q. Do you know of any sales around that bar of 1,300,000 cubic yards, the amount that you estimate on that property? A. Not lately.

(Testimony of William Harlan Morrison.)

Q. Do you know of any pioneer acquisition of the property?

A. May I have that question again?

Q. Do you know of any sales at any time on that bar of 1,300,000 cubic yards of gravel, as gravel?

A. There has been no project requiring it——

Mr. McMillan: May I ask that that be stricken out and the witness instructed to answer the question?

The Court: Yes. Answer the question.

A. The answer is no.

Mr. McMillan: Q. In your opinion, could 1,300,000 cubic yards of gravel have any market for any person or any institution except someone like the United States of America, engaged in projects similar to the Ruck-a-Chucky Dam or the Shasta Dam?

A. Could a private party—let me see if I understand the question—could a private party use that much gravel?

Q. I am undertaking to ask the questions.

A. Well, I am trying to see if I understand the question.

The Court: The reporter will read the question. [143]

The Witness: Yes; will you please read the question?

(Question read by the reporter.)

A. It is true the Government is the biggest buyer of that class of material. I have in my brief

(Testimony of William Harlan Morrison.)

case now requests for bids from the United States Government, the Department of Reclamation, but we haven't bid recently.

Mr. McMillan: Q. Or the State of California?

A. The State of California, perhaps.

Q. Yes. Do you know of any private corporation or concern——

A. Not at this time.

Q. Well, at any time? A. Yes.

Q. That you have owned the property?

A. The power companies—the P. G. and E. have bought that much material at one time or another.

Q. For what purpose?

A. The erection of plants for power purposes.

Q. Where?

A. All over the State of California.

Q. I mean in the vicinity of this property.

A. The Calaveras Plant is in this vicinity——

Q. Well, that is a very large public utility, exercising the power of eminent domain.

A. That is right. That is the way I am trying to answer your question.

Q. That was a power project, wasn't it?

A. That is true.

Q. Do you know what the cost of that project was? A. Not offhand, no.

Q. Now, you have made no further tests yourself except those to which you have testified?

A. That is true.

Q. One question I want to ask you, Mr. Morrison, before you leave the stand: Did I understand

(Testimony of William Harlan Morrison.)

you to say yesterday that of your own knowledge you know of some truckloads of gravel taken by this [144] contractor up to the dam in connection with the construction of it after this condemnation suit was filed? A. Yes.

Q. You know it was taken from this property, do you?

A. I saw it leave there, but I don't know where it went.

Q. You saw it leave there, but you don't know where it went? A. No.

Q. You do know that in Section 24 the Government had taken property there, also, do you not?

A. Yes.

Q. And that Mr. Pollock had a camp site there, did he not?

A. He did have a camp site up on the hill. Whether it was Section 24 I wouldn't be able to say.

Q. It wasn't on your property?

A. What?

Q. It wasn't on your property? A. No.

Q. He had trucks up there, didn't he?

A. Yes.

Q. And there was a gravel bar on the river up there, wasn't there? A. Not much of a bar.

Q. Not much of a bar. Well, sufficient for a couple of truckloads? A. Yes.

Q. And there was a road from that property to the proposed damsite, wasn't there?

A. Not at that time.

(Testimony of William Harlan Morrison.)

Q. When was it put in there?

A. I couldn't say exactly what date.

Q. Well, will you testify that that gravel was not taken from that small bar by Mr. Pollock?

A. No, because I didn't stay there and watch him.

Q. You will not testify it was taken from your property, now, will you?

A. Yes, I will testify there was two truckloads left our property with gravel. Where it went I don't know.

Q. That is, you saw two truckloads of gravel drive from your property, but you don't know from where it was taken, do you? [145]

A. Yes, I do know where it was taken from, because I was sitting in the cabin looking out.

Q. Then that was before the 10th day of October, 1939, wasn't it?

A. Is that the date you took possession?

Q. That is the date the complaint was filed.

A. No, it was after that.

Q. How long after that?

A. Oh, a week or ten days, perhaps.

Mr. McMillan: That is all.

Mr. Cornish: That is all.

(Witness excused.)

Mr. Cornish: Mr. Miedel, will you take the stand?

RUSSELL J. MIEDEL,

Called for the Defendants; sworn.

Direct Examination

Mr. Cornish: Q. Mr. Miedel, where do you live? A. I live in Piedmont, California.

Q. And in what business are you engaged?

A. I am engaged in the glass manufacturing business in Oakland, California.

Q. And with what concern are you connected?

A. The Hazel Atlas Glass Company.

Q. And what is your position with the Hazel Atlas Glass Company?

A. I am director of sales.

Q. How long have you been connected with the Hazel Atlas Glass Company?

A. Twenty-seven years.

Q. And you are one of the defendants, the defendant named as R. J. Miedel, in this action?

A. Yes.

Q. And associated with Mr. Morrison and Mr. Somerby in the attempts to mine or gain profit of some sort from this particular piece of property that is in question in this action? [146]

A. Yes.

Q. Now, when did you first become connected with this property, Mr. Miedel?

A. Well, we all started together—I can't give you the exact year—I think it was somewhere around 1932.

Q. 1932? A. That was my recollection.

(Testimony of Russell J. Miedel.)

Q. At that time was there any mining machinery on the property?

A. Yes. We made a deal with a man by the name of Texas Crone, I think his name was, who had a dragline, and my recollection was he had the dragline on that bar when we negotiated and went in there.

Q. When you say you went in there, what did you do in the way of going in?

A. Well, we put up money.

Q. And at the time that you put up the first money had you investigated the title of the property?

A. Yes, I think we did.

Q. Had you obtained a search of title by a title company when you put your first money up?

A. No.

Q. And for how long a period of time after you put up your first money did the Crones operate this property?

A. I would say offhand for a period of approximately two years.

Q. Two years. Now, during the time that the Crones operated the property approximately how much money did you and your associates invest in machinery alone?

A. I can't answer that question because I don't recall it. I would have to consult our records. We have records on it, but I can't say offhand.

Q. What money was put in in machinery, Mr. Miedel, had been—the machinery had been damaged and broken up by floods before the Govern-

(Testimony of Russell J. Miedel.)

ment became interested in condemning this property, had it not? A. That is right.

Q. And except for small bits of salvage lying around the bar, [147] like a bucket or tipped-over hoist, or something of that sort, you had no machinery in place? A. That is right.

Q. Now, Mr. Miedel, when did it first come to your attention that there was any question over the title of this property?

A. Do you mean when we heard that the Government was going to come in?

Q. No. That anyone else other than yourselves, the Crones and the O'Connors, claimed title to the property?

A. Well, our claims were jumped, I think it was in the year 1934, and we had a suit, at which time the judge decided in our favor, that our claims had been jumped.

Q. That was the case of American River Gold Mining Company against O'Connor and the rest of you that were interested, that was pending in the Superior Court of the State of California, in and for the County of Placer?

A. That is right.

Q. Do you recall the date that was decided in your favor?

A. No, I don't remember what the date was.

Q. Now, following the determination of that suit, did you invest any more money in mining machinery on the property? That is, you yourself? Any substantial sums?

(Testimony of Russell J. Miedel.)

A. No sizeable amount.

Q. What, if anything, did you do with the property following the determination of this case of the American River Gold Mining Company versus O'Connor?

A. Will you repeat that question, please?

(Question read by the reporter.)

A. The only thing we did, according to my recollection, is that we kept a watchman on the property to keep it from being jumped; did our assessment work.

Q. Did you do anything concerning the title of the property?

A. Well, we spent a considerable amount of money doing our [148] assessment work so we could get a patent from the Government.

Q. And an application was made to the Government for a patent, was it?

A. Yes, sir; and it was granted.

Q. Now, Mr. Miedel, at the time this application for a patent was made did Mr. Morrison and Mr. Somerby and Mr. Fisher retain any interest in the property?

A. Yes, they had an interest in the property.

Q. And what was their interest in the property?

A. Their interest in the property at that time, it is my recollection, was—they had, I think, 25 percent each.

Q. And was that in the property itself, or in the right to operate the property?

A. The right to operate the property.

(Testimony of Russell J. Miedel.)

Q. And with respect to the title of the property itself——

A. The patent was granted in the name of Fred and Stella O'Connor and myself.

Q. And at the time that the patent was applied for did Mr. Morrison or Mr. Somerby or Mr. Fisher have any interest in the title of the property, or had that previously been transferred?

A. That had been previously transferred. They didn't have any title in the property itself.

Q. To whom had that transfer been made?

A. To me.

Q. And as a result, the application for patent was made, and the patent was issued to yourself as a one-half owner, and to Mr. and Mrs. O'Connor as one-half owners?

A. That is right.

Q. Now, in respect to the time that this condemnation suit was filed, was that patent issued before or after the suit was filed?

A. The patent was issued before the condemnation suit was filed.

Q. Was it actually issued before, or was it applied for before?

A. It was applied for, I think, Mr. Cornish—I am not quite [149] sure.

Q. To refresh your recollection as to the date, it was issued August 28, 1940, was it not?

A. I think the condemnation suit was filed against us in November, wasn't it?

Q. The condemnation suit, Mr. Miedel, was filed in October, 1939.

A. 1939.

(Testimony of Russell J. Miedel.)

Q. Now, before this condemnation suit was filed, Mr. Miedel, you were present at a number of conferences in the office of Judge Hjelm, who was then United States Attorney?

A. Yes; we had many conferences with Judge Hjelm and representatives from the United States Engineers.

Q. That was, in particular, Mr. Stanley?

A. Yes, sir.

Q. Now, do you recall the first inquiry concerning the property, as far as its gravel value was concerned?

A. The first inquiry, I think, was in the year 1936 or 1937, at which time we had a talk with a major of engineers, who I think his name was Harrison—I am not positive about that name, but that is my recollection.

Q. Major Harrison, you say?

A. Harrison. And he raised the question as to what we considered the value of the gravel in the property to be. He was later transferred, and I think his place was taken by a man by the name of Colonel Chambers.

Q. Do you recall that during the month of February, 1939, a request was made by Colonel Chambers for you to submit a price at which you would sell certain gravel interests in the property?

A. What year was that, please?

Q. In February of 1939.

A. Yes. We had arrived at an understanding with Judge Hjelm—

(Testimony of Russell J. Miedel.)

Q. I refer now to before Judge Hjelm came into it. A. Oh, before? I am not sure. [150]

Q. To refresh your recollection, Mr. Miedel, I will show you a letter from the War Department, addressed to the office of Cornish & Cornish (exhibiting document to the witness).

A. Yes, that is right.

Mr. McMillan: Q. What is the date of that?

A. February 17, 1939.

Mr. Cornish: Q. Then it was on or about the 17th of February, 1939, that negotiations first opened for the sale of this gravel?

A. That is right.

Q. Now, in earlier conferences, Mr. Miedel, what approach did you make toward the determination of a price? Was it on a royalty basis, or was it on a flat sum basis?

A. My recollection is that we first offered this to the Government on a royalty basis, and we were told that they wanted an outright price.

Q. Were you told by them as to what they considered the gravel to be worth?

A. My recollection is they told us they considered gravel to be worth, in place, 10 cents per cubic yard.

Q. That was who made that statement?

A. My recollection is that statement was made by Mr. Stanley, the Government engineer.

Q. Mr. Stanley said he considered it worth about 10 cents a yard in place?

A. That is right.

(Testimony of Russell J. Miedel.)

Q. Now, in these conferences, Mr. Miedel, was the amount of gravel that the Government intended, or then thought they would take, discussed?

A. Yes; we had a number of discussions on that. First we wanted to hold the Government to a specific amount of gravel, and they didn't want a specific amount named, because it was quite possible, with the large-sized trucks that the contractor had to use, that a considerable amount of gravel would have to be used on a road, because they were going to use very large units, and they wanted a free hand to take any amount of [151] gravel they so desired.

Q. And was there anything said about the price you were willing to make on the gravel if the Government recovered the gold for you?

A. The matter, as I say, was handled by many conferences and many approaches, but in the final—one of the later conferences, we asked for \$20,000 for the right to take over the property and build sluice boxes and jigs to handle it from a stationary plant. Mr. Stanley did say then, representing the United States Engineers, they didn't want to go about \$10,000. We shaved our price to \$15,000, and Mr. Stanley didn't want to go any higher than ten, and I finally said to Judge Hjelm, "You set the price which you think is fair, and I will stand on it." He said, "We will split the difference; make it \$12,500." I said, "All right," and we shook hands and made the deal. You understand, in addition to that payment of \$12,500, the Govern-

(Testimony of Russell J. Miedel.)

ment was to do other things to assist us in mining the gold. They were to dig the gravel, lift it up 20 feet in the air, provide us with water, and provide us with power—all the things necessary to run it through the sluice boxes and the jigs. And when we extracted the gold they were to remove the tailings, and do many things which would be an expense on us if we were operating it; and the size of the gravel was to be an inch and an inch and a quarter.

Q. In addition to the payment of \$12,500, the Government was to dig the gravel, elevate the gravel to the height at which it would go through your concentrating devices by gravity, furnish water and furnish power, and remove the tailings, is that right?

A. That is right. You understand by that also, that the construction we had in mind was this: We were ready to mine this property. It meant an investment of somewhere between possibly [152] forty to fifty thousand dollars. On this deal the Government was doing it for us, so it wasn't necessary for us to make any capital expenditure.

Q. Now, Mr. Miedel before this condemnation suit was filed, and when the negotiations were pending, did you have an opportunity to purchase mining equipment to use on this property?

A. Yes, we could have purchased mining equipment.

Q. Are you familiar with the deal between Mr.

(Testimony of Russell J. Miedel.)

Morrison and the Pan-American Dredging Company for the purchase of a dredger?

A. Yes. He discussed this with me and I said it was O. K.

Q. You were going to put up the money?

A. Yes. I am financially able to finance that deal.

Q. And at that time you intended to do it had the Government not been intending to condemn the property?

A. That is true. And you also understand, Mr. Cornish, that the United States Government, through the RFC, were lending money to encourage mining in the State of California.

Q. Now, Mr. Miedel, after this deal was made, you have testified to involving the payment of \$12,500, was that deal completed?

A. After we shook hands on that deal in this building here with Judge Hjelm, a little bit later I was called back up and a conference was arranged with Colonel Chambers, Mr. Stanley, Mr. Hjelm, and I think one or two other engineers, at which time Colonel Chambers objected to the price, and he wanted to know if we wouldn't be willing to shave that price so that he could go along with it a hundred percent. We thought the matter over, and to terminate it we agreed to reduce the price, my recollection is, five percent, or somewhere around \$11,750. Then we thought the deal was completed and was going through as soon as Judge Hjelm could complete the title. He had gone back,

(Testimony of Russell J. Miedel.)

as I understand [153] it, to everybody who had filed on these claims to the year 1850, and he was making a title search, and he told me that as soon as he could complete this search, notwithstanding that we were getting the patent, that the deal would be completed. Then the bids for the contractor were published before our condemnation suit, and in it it carried the agreement which Judge Hjelm and I had agreed, as to what the contractor was to do to take the gravel, such as raising it 26 feet, supplying us with so much water and so much power, digging the gravel, and taking it away from the sluice boxes, and we assumed we had a deal, but as far as paying us any money or doing anything else, they have never done it.

Q. Do you know, Mr. Miedel, whether any overtures were made to obtain from the Government permission to mine a portion of this property while the gravel was being recovered?

A. Yes. In our talks with the engineers and Judge Hjelm, we asked permission to retain half of the bar so we could start mining, and my recollection is we also asked for another portion of the bar to start mining. In fact, that point was up a number of times, and each time we were told they didn't want us on the property. In other words, they wouldn't give us permission to mine any part which they would not use for their own use.

Q. And was there any discussion in these conferences, Mr. Miedel, concerning the depth that

(Testimony of Russell J. Miedel.)

the contractor would excavate in order to get this gravel?

A. Yes, that point was raised, and we wanted to have them agree that they would just take off the top, because we considered that the further down it went the richer the property became, and they said they didn't want any restrictions on them in any way; they wanted the property, and they were going to take as much gravel as they needed, and they were going to do it the way the contractor felt he wanted to do it. [154]

Q. And the only restrictions or concessions which the Government made are those written in the complaint, namely, the digging of the gravel, the elevation of the gravel, the removal of the tailings, and the furnishing of the water and the power?

A. That is correct.

Mr. Cornish: You may cross examine.

Cross Examination

Mr. McMillan: Q. Your name is Robert Miedel, isn't it?

A. Russell.

Q. Oh, Russell? A. Yes.

Q. Mr. Miedel, you have been in the glass manufacturing business? You are now, are you?

A. Yes, sir.

Q. Salesman for that large company, a well known company, which is over in Oakland, isn't it?

A. Yes, sir.

(Testimony of Russell J. Miedel.)

Q. How long have you been with that company?

A. Twenty-seven years.

Q. Well, the fact of the matter is, you don't profess to be a mining man, do you?

A. No, sir.

Q. And is this your only experience in a mining venture?

A. No, I have been in other mining ventures.

Q. Well, I mean in short, not to make this examination time-consuming, you have never had any education as a mining engineer?

A. No, sir.

Q. Or anything along that line; and you make no such profession?

A. That is right.

Q. You are a business man?

A. That is right.

Q. And, we know, a successful one. Now, I suppose you have taken up several mining ventures?

A. Yes, I have been in a number of mining ventures. I was born and raised in West Virginia, and I was in the coal mining business back there, and I own stock [155] in certain mining ventures here in California, and I have been in certain claim deals.

Q. Yes. And some of them panned out and some of them didn't?

A. That is right.

Q. On the whole, you fared pretty well, though, didn't you?

A. Yes.

Q. But some of them were a complete loss?

A. Yes, sir.

(Testimony of Russell J. Miedel.)

Q. In brief, persons knowing that you are well-to-do financially, interested in those matters, would seek you out and sell their ventures and themselves to you—that is about what it is—and you would invest in it?

A. If the thing had possibilities of profit, I am always interested.

Q. If they convince you of that?

A. I use my own judgment on that.

Q. And like many of us, it proves——

A. Sour.

Q. (continuing) ——unfortunate. Who first interested you in this project, this property?

A. Well, Mr. McMillan, I was approached by Mr. Fisher, who told me that this man Crone——

Q. Oh, I don't care—I don't think we need to go into all of that, Mr. Miedel. I mean about when did it come up?

A. Oh, around 1932, I would say.

Q. At that time the property had been withdrawn from entry by the Government, hadn't it?

A. I am not prepared to say about that. I don't know about that.

Q. You don't assume to know any of those technical phases? A. No, sir.

Q. Do you know when the property was reopened for entry? A. No, sir.

Q. When did you first go on the property and become interested in [156] working it?

A. I think, Mr. McMillan, as I testified, it was in 1932.

(Testimony of Russell J. Miedel.)

Q. Well, that was before the property had been reopened for entry?

A. I don't know about that.

Q. As a mining claim. Well, it was worked, then, during the period, then, when it was withdrawn for entry?

A. I can't answer that. You have to ask Mr. Morrison. He handled the details of that.

Q. When did you first meet Mr. Morrison in connection with this matter?

A. Well, I knew Mr. Morrison for a good many years.

Q. You knew him about that time?

A. Yes.

Q. And he came into this venture about when?

A. The same time I did.

Q. About 1932? A. Yes, sir.

Mr. Cornish: Mr. McMillan, do you want to enter into a stipulation as to the date that property was restored?

Mr. McMillan: Yes. It was August 28th, I think.

Mr. Cornish: Three months prior to August 28th.

Mr. McMillan: 1934.

Mr. Cornish: Three months prior to that there was an order made restoring the property to location, but preserving the period of three months prior to August 28th, up to August 28th—that would be a 90-day period—was reserved for location by veterans under the Homestead and Desert Lands laws.

(Testimony of Russell J. Miedel.)

Mr. McMillan: That is correct.

Mr. Cornish: In other words, there was this 90-day preferential period preceding August 28, 1934, but it was our contention in the proceeding in Auburn——

Mr. McMillan: I don't care for that—— [157]

Mr. Cornish (continuing): ——which was sustained by the Court——

Mr. McMillan: Just a moment.

May it please your Honor, I don't want anything else in that stipulation. He asked me for a stipulation——

Mr. Cornish: I think we will get along better, Mac, ——

Mr. McMillan: I know, but I am not stipulating to contentions of counsel at Auburn. He asked me if I would stipulate as to when it was reopened for entry, and I stipulated with him on that. Now, I am calling for this stipulation: Will he also stipulate this mining location was withdrawn from entry on June 8, 1928?

Mr. Cornish: If you say that is the date, I will stipulate, because I know, from my investigation at the time that these people went on the property, it was not subject to mining location, and I know that the earliest time that it was subject to a valid mining claim location was August 28, 1934.

Mr. McMillan: That is correct.

Mr. Cornish: Now, as I say, there was some question about whether a veteran could locate under the mining laws, and we took the position that they

(Testimony of Russell J. Miedel.)

could not, and the Superior Court in Auburn ruled that they could not, so I think the 28th of August, 1934, is the earliest date.

Mr. McMillan: Q. Now then, in view of the explanation that has just been made by your counsel, Mr. Miedel, you understand that during that period of 1932 that you have mentioned, up to August 28, 1934, that that property was not open for entry as a mining claim, except that three months prior to that it was open for veterans under homestead entry? Is that your understanding of it?

A. That is right, but as to the exact date we started [158] to mine on that, Mr. McMillan, I can't recall. You can ask Mr. Morrison; he can tell you.

Q. Well, what was Mr. Morrison's connection with this? Was he the man representing you that kind of took charge of this?

A. Mr. Morrison has been in charge of the operation of this property ever since we have had it.

Q. And has promoted it, hasn't he?

A. Promoted—well, I would say he has operated it. We haven't sold any stock.

Q. But you are the man that put up the money?

A. That is right.

Q. From start to finish. And you quit putting up money when?

A. I am still putting up money.

Q. I mean of any sizeable amount.

A. 1934.

(Testimony of Russell J. Miedel.)

Q. You purchased some machinery in 1934?

A. Yes.

Q. Was that before it was reopened for entry?

A. I couldn't answer that. I haven't the date——

Q. But you bought it?

A. Yes. I think I can give you the exact date by consulting the books, if you desire.

Q. No; that is satisfactory to me. You put money in to buy machinery, and the machinery was bought, and it was lost? A. That is right.

Q. Now, since that time you haven't put in any sizeable sum?

A. I would say I have been putting in sizeable sums; attorneys' fees, and watchmen—those all run into a large sum.

Q. Well, isn't that since it was open for entry?

A. Well, it is still going on.

Q. Take this date I mentioned here, August 28, 1934, did you put any money in after that, of any size?

A. Oh, I would say that our expenses since that time, if that was before we bought the machinery, has run into quite a few thousand dollars. [159]

Q. And after you bought the machinery?

A. We have had a constant expense, yes.

Q. Well, you had to do some work and have some expense in order to do your assessment work to prove up on the property?

A. That is right.

Q. And I take it for granted you are the gentle-

(Testimony of Russell J. Miedel.)

man who paid the Government for the property under your application for a patent?

A. That is right.

Q. That is \$2.50.

A. I am not even familiar with that.

Q. Well, you just put up the money and the others took care of the details?

A. The operation of the property was under the jurisdiction of Mr. Morrison, and I am not so familiar with the details of the operation; but in connection with Mr. Morrison and Mr. Cornish, I negotiated the deal we entered into in good faith with the United States——

Q. I am not questioning you about your dealings, Mr. Miedel, with the Government. I will grant you were acting in good faith. And you would state, too, I take it, that in your negotiations with the Government, with Mr. Chambers and Mr. Hjelm and the United States Engineers, that they were acting in good faith, wouldn't you?

A. Well, we assumed so.

Q. As far as that goes, everything was going along harmoniously, everything was going along nicely, until that landslide occurred, is that correct?

A. Well, we never received any money.

Q. Well, you know why, don't you? Didn't Mr. Hjelm explain that to you?

A. The only thing he told me was he was checking up on some old people that filed on it 50 years ago; he wanted to make a title search. And in that connection I will say, Mr. McMillan, I agreed

(Testimony of Russell J. Miedel.)

that I would be willing to put up a bond of \$50,000 that our title was all right. [160]

Q. You understand, Mr. Miedel, you appreciate, of course, I wasn't at the conferences. As I understand your testimony, you finally agreed on a sum, you said, of \$11,750, is that right?

A. I believe that was right. As I said before, I don't remember the exact—

Q. And the purpose of that was to give you the machinery to recover the gold?

A. That money was given to us after many talks and conferences by Mr. Hjelm for several reasons: First, he gave us that money because of the fact it was to be a stationary plant, and we couldn't use it when we were through; we had to have a portable plant to properly work those bars. In addition to that the engineers thought that the amount was too high, but we agreed to allow them to take the amount of gravel which they wanted from that property under certain conditions—you understand that we figured there would be 200,000 cubic yards in place removed and we figured the amount of money of the values recovered plus the work the Government would do would run well over a hundred thousand dollars—

Q. In this conversation wasn't it called to your attention that it was estimated it would require about 75,000 cubic yards for the construction of the concrete of the dam?

A. That was the minimum.

Q. That was the minimum?

A. Yes.

(Testimony of Russell J. Miedel.)

Q. But that figure was used, wasn't it?

A. Yes, sir.

Q. Well, you never had any signed agreement with the Government as to the payment of that money?

A. No, sir; all we did, we shook hands on it, which was a deal enough for me.

Q. It was explained to you, wasn't it, that any agreement Mr. Hjelm might make, he would have to submit to the War Department and recommend its acceptance, and the War Department would take [161] it up with the Attorney General's office and give its recommendation—I think he explained that quite clearly, that he could do nothing until he had submitted it to Washington and had it approved?

A. Mr. McMillan, Mr. Hjelm told me definitely that the duty of the United States Attorney was to make the best settlement possible, regardless of the War Department. In other words, he tried to make decisions for the Attorney General, and not the War Department, and he told me that several times when they weren't settled on the details——

Q. But he couldn't make any contract without approval from Washington? Didn't he say that?

A. He said he had authority from Washington to proceed with the deal.

Q. Yes, to proceed with the negotiations, but not to conclude them?

A. I don't know about that.

(Testimony of Russell J. Miedel.)

Q. I understand one of the reasons for having the condemnation suit was for Mr. Hjelm to clear up the title?

A. My recollection was that the reason the condemnation suit was filed was because we insisted in having this agreement in writing.

Q. Didn't Judge Hjelm, after having made this search of the title and found all these persons that were interested in the property, insist that the most expeditious way of getting the title cleared up was to have a condemnation suit filed?

A. No. My understanding, according to my recollection at that time, is what would happen when everything was settled and he had these people out of the road, he would go into court and agree with my attorney on the deal we had negotiated.

Q. He did tell you he had a title report that revealed a great many persons interested in the property?

A. That is right.

Q. Yes. And that he would file a condemnation suit naming all [162] these parties, and then he would come into court and an arrangement with you and your attorney would be made to clear this up satisfactorily and without trouble to yourself? Didn't he tell you that?

A. That is correct.

Q. Now, everything was going along serenely and harmoniously, wasn't it? There may have been a little delay here and a little delay there, but in your judgment, don't you think things would

(Testimony of Russell J. Miedel.)

have been satisfactorily concluded if this landslide hadn't come along and disrupted all plans?

A. Mr. McMillan, I have been in business a long time, and I have always found that when you make a deal and it turns sour, you pay. That is the way I have done. It wasn't any fault of mine——

Q. That is not the point of my question. The point of my question is, everything was going along nicely; you were working on clearing the title to the property, and Judge Hjelm said that the best way to clear the title would be to file this condemnation suit? A. I think that is right.

Q. And in that connection you went ahead in good faith and sent the money along with your application for patent after the suit was filed, about 20 days, in payment for the patent, and maybe six or eight months after the suit was filed you got the patent to the property, didn't you?

A. That is right.

Q. So you didn't get your title to the property, your patent—that is, yours and Mr. F. M. O'Connor's—isn't that correct? A. Yes.

Q. And Stella O'Connor, his wife—until many months after the suit itself was filed? That is all true? I am trying to paint this picture, if I can, from your testimony, Mr. Miedel, that all parties were working harmoniously to get this thing in shape as soon as possible, in connection with and pursuant to [163] negotiations you had had, isn't that true?

A. Yes, I would say Mr. Hjelm wanted to con-

(Testimony of Russell J. Miedel.)

clude the matter up just as much as we did and get it out of his office.

Q. As to whether or not, personally, Mr. Pollock ever went into possession of the property, and what he did up there, you don't know, do you?

A. Well, it is all hearsay.

Q. Yes. Personally, you don't know?

A. I will say this: I was in Mr. Hjelm's office with Mr. Morrison, and Mr. Hjelm turned around to Mr. Pollock's foreman, Dunning, and he said, "You can take possession of this property"——

Q. When was that?

A. That was sometime in 1939, is my recollection.

Q. Was it after the suit was filed?

A. It was before the suit was filed.

Q. You don't assume that Mr. Hjelm would have any authority to give anyone any possession of the property, do you, for the Government?

A. He made that statement in front of Mr. Morrison and I.

Q. Well, that only indicates that everybody was acting in good faith and you were going on through the transaction as soon as you could, doesn't it?

A. Yes, sir.

Q. And Mr. Hjelm himself took it for granted that you were going on through the transaction?

A. Yes, sir.

Q. That is that. Now, as I understand it, going to the first—Major Harrison—was that his name—first came to you about some gravel?

(Testimony of Russell J. Miedel.)

A. I think, Mr. McMillan, what I said was I think his name was Major Harrison. I wasn't certain.

Q. Well, that was long before, about three years before you started your negotiations with Judge Hjelm and the others, wasn't it?

A. Well, that was in 1936, and we had many meetings [164] from 1936 on. I wouldn't say——

Q. Well, you had, then, as early as 1936, heard about that proposed Ruck-a-Chucky Dam?

A. We heard about it, and the reason we investigated it was because we were getting ready to buy mining machinery, and we figured there was no use going in there if the Government was going to take it from us.

Q. You had heard of it? A. Yes.

Q. You never did buy any mining machinery?

A. No, sir—only what we bought originally, before the flood.

Q. You said something about the Reconstruction Finance Corporation was lending money at that time on mining claims to encourage the development of mining. Did you ever make an application to the Reconstruction Finance Corporation for a loan?

A. No, sir; it wasn't necessary. I was able to finance this myself.

Q. Well, did you? Was an application made to the Reconstruction Finance Corporation for a loan? A. Not to my knowledge.

Q. Isn't it a fact you sought information of

(Testimony of Russell J. Miedel.)

the Reconstruction Finance Corporation to see what the requirements would be on a loan of \$25,000?

A. We naturally investigated all phases of the business, because there was a considerable amount of money involved. I personally didn't investigate the Reconstruction Finance Corporation, but I am quite familiar with their laws, because we had quite a few dealings with them in handling the container needs of our customers in the glass business I am in. I am familiar with what is required in a general way, but as far as I am personally concerned, I never made any application, never called on them, or never saw them.

Q. Do you know whether or not Mr. Morrison, who took active charge of this property, sought any information in reference to a proposed loan of \$25,000, and was advised that before a loan could [165] be made you would have to sink at least 20 holes and stagger them according to the requirements set forth, and it was concluded that it would cost \$20,000 to do that, so no application was ever made?

A. I discussed it in a general way with Mr. Morrison. I don't know the details, but I do know I never signed any application for a loan.

Q. You know no application was made, but in reference to these figures as I have given them, I have stated them about right?

A. It is my recollection, Mr. McMillan—I am not positive about this—holes had to be sunk—shafts, I think it was, every five feet, and we

(Testimony of Russell J. Miedel.)

estimated it would possibly cost us, according to the figures we had, about at that time—I think it was somewhere around \$3,500.

The Court: The Court will take a ten-minute recess.

(Recess.)

The Court: You may proceed, gentlemen.

Mr. McMillan: May it please your Honor, I think I only have one or two questions to ask of Mr. Miedel.

Q. Is this not correct: that the reason that you tried to make arrangements that the gravel would be taken at a certain depth, that you regarded that the values were down deeper in the property?

A. We figured that the further down we went to bedrock the greater the values would be.

Q. I was just looking at an affidavit filed in this proceeding by Mr. Morrison, and I observe in this affidavit that he states that on October 10, 1939—(reading):

“On October 10, 1939, the Defendant R. J. Miedel renewed his offer under all the terms and conditions set forth in Exhibit A attached hereto, except the cash price was reduced from \$12,500 to \$11,875.” [166]

You said \$11,750. I guess the correct amount was \$11,875.

A. Yes. I told you, Mr. McMillan, I didn't recall the exact amount.

Q. Yes. And then (reading):

(Testimony of Russell J. Miedel.)

“Defendant further states said offer was reduced to writing, a copy of which is attached hereto and marked Exhibit A, and that said offer was never accepted.”

You said that the offer had been accepted.

A. I never talked to Colonel Chambers again. That was the only session that I recall that he was in. But I did have further sessions with Judge Hjelm, and he said that he thought that the colonel was very well pleased to get this reduction, because he understood at that time that he had authority from the Attorney General of the United States to negotiate the deal on the basis of \$12,500, and he thought the colonel was seeking a little glory.

Q. What Mr. Morrison had in mind was it had never been signed up.

A. Never been signed up.

Q. That is what he actually had in his mind?

A. Yes.

Q. Had it ever been brought to your attention that there was about 45,000,000 pounds of black sand on that property up there that carried platinum, chromium, and all that, and that was worth a dollar a pound?

A. All I know about that is in a general way. I heard the matter of black sand discussed, but I don't know whether——

Q. In other words, Mr. Morrison, or no one else, has ever been able to interest you in the black sand, has he?

A. We talked about the black sand in a general

(Testimony of Russell J. Miedel.)

way on the property, but as to the value of it, I have no basis—I [167] understood there was a trace of platinum and things of that kind in it, but just how much I didn't know.

Q. To a business man of your experience, if anyone told you there was \$45,000,000 worth of black sand, I imagine you would prick up your ears, wouldn't you, on your property?

A. Yes, I would be very much interested.

Mr. McMillan: That is all.

(Witness excused.)

Mr. Cornish: Mr. Mead, will you take the stand, please?

WILLIAM HOWARD MEAD,

called for the Defendants; sworn.

Direct Examination

Mr. Cornish: Q. Where do you live, Mr. Mead?

A. I live at 1007 Harvard Road, Oakland, California.

Q. What is your business?

A. I have a business in San Francisco which is part sales representation, part construction, and part engineering.

Q. With what type of commodity?

A. Well, we represent the Heinemann Company

(Testimony of William Howard Mead.)

in the 11 Western States in the sale of crowns, tin crowns; represent the Michael Yunt Company of Waukeshau, Wisconsin, in the sale of bottle-washing and pasteurizing equipment; we represent several firms in the dehydrating field, water hoists; we have built blood-transfusion valves in the amount of about 6,000 of them for the Cutter Laboratories of Berkeley, California; we have built special machinery for them; we have done special types of viscosimeters. When this war started I offered my services to the Marines, and I haven't been accepted, and the net result is I thought I should do something, and we built a new type dredge, and we are preparing at the present time [168] to ship one to Bolivia to dig some tin in the Cochabamba region.

Q. How long prior to the war had that dredge been designed?

A. The dredge had been designed in 1935, was the first design made of the dredge. It was originally built by Gus G. Baker down in Fresno, in connection with Herbert Hopkins, and it is a new type low-cost digging unit.

Q. And what is the principle on which that dredge operates?

A. The velocity of water passing through an orifice serving as a carrying medium.

Q. Is it what is customarily referred to as a suction dredge? A. It is.

Q. In other words, a pipe is placed down into the water, and as a result of the velocity of the

(Testimony of William Howard Mead.)

water in being carried through this pipe, the solid substances in and about the water are carried through that pipe with the water?

A. That is true.

Q. And has that dredge been tested, Mr. Mead?

A. Well, in the form of a test, I might say that the first boat was a four-inch boat—the four-inch designation meaning the size of the discharge of the pump which was employed to pump the water, which in turn carried the solids. It was built in Fresno by the Valley Foundry & Machinery Works, and it was put out on the San Joaquin River at the Friant Dam 14 miles from Fresno. The first four-inch unit had a capacity of displacement of 400 yards per day, 20-hour operation.

The second unit that was built as the result of the successful operation there was a six-inch boat. That had a six-inch pump and handled about 1,900 gallons of water a minute through this revolving suction head, with a limited orifice in the bed. That boat handled 900 yards a day. [169]

The values they were recovering were within eight per cent—the values that were recovered were within eight-tenths of one cent of the total values as the operators had drilled them, as shown on their drill sheets.

Q. And for what particular commodity were these operations designed?

A. Prior to the war it was for gold.

Q. And you say that they recovered within eight-

(Testimony of William Howard Mead.)

tenths of one cent of what the tests, the drilling tests, had established were present in the ground?

A. That is right. The drill samples showed that the soils were worth about 10½ cents a yard, and they recovered within eight-tenths of a cent, and royalties were paid on the balance, which can be checked with Mr. A. S. McGuire in Fresno.

Q. Now, have you, since the war, developed this dredge further?

A. Well, there have been four eight-inch dredges built as the result of the success of the six-inch dredge.

No. 1 is the boat which we have at the present time, which we are re-designing and re-building for dredging tin, to be sent to South America.

The second boat was sold to Mr. Bill Franklin of Montana and put on the Missouri River.

The third boat was sold to Mr. Cowden and put on the Klamath River.

And the fourth boat Mr. Baker owns himself—or rather, he owns half of it, I will put it that way.

Q. Are you familiar with the property that is involved in this litigation that is sometimes called Cherokee Bar and sometimes called Spanish Bar, on the Middle Fork of the American River?

A. I have been there several times.

Q. And will you state your opinion, Mr. Mead, as to whether this [170] dredge that you have designed will dredge the gravels and recover the gold that exists on that property?

A. Well, primarily to dredge—I didn't design it;

(Testimony of William Howard Mead.)

we have added improvements to it. The fundamental principles were by Mr. Baker——

Mr. McMillan: May it please your Honor, the proper foundation has not been laid; the witness has not qualified himself; and secondly, there has been no test made by this equipment to which the witness has testified upon this property; and further, the foundation has not been laid as to the extent of the study and examination he has made on that property up there.

Mr. Cornish: Q. Mr. Mead, has this dredge of your own been operated on gravels similar in form?

A. Quite similar.

Q. And structure, to the gravels on this bar?

A. It is similar to the gravel—any free-flowing gravel can be handled by this dredge. Cemented gravel, no. To the best of my knowledge, without putting down any pits, the gravel on the Cherokee Bar is not cemented.

Mr. McMillan—I ask that go out; he has testified “to the best of my knowledge”——

The Court: It may go out.

Mr. Cornish: Q. Assuming, Mr. Mead, that the gravel on this bar is not cemented, in your opinion would this dredge that you built recover the gold that might be in that gravel bar now, assuming that the gravel is not cemented?

Mr. McMillan: I still, may it please your Honor, state that he has not laid the foundation. He has not submitted yet for my understanding—I may be very obtuse—just what tests he has made, what

(Testimony of William Howard Mead.)

examinations, what depths he went down into the gravel, what soil conditions he found. I am still on top of the surface [171] there, from all I know, in the gravel on top of that property.

Mr. Cornish: May it please your Honor, the evidence which has been heretofore submitted, shows that this gravel is a free-running gravel; that it must be timbered all the way down in order to keep the hole from caving in, and that the lower portion of it is below water. Mr. Morrison has testified that in the two holes he sunk it was necessary to keep them timbered, and timbered tightly, in order to keep the holes from caving in, and that he was working under water at the bottom part of these excavations. Your Honor will recall that one of the things he did in the shaft behind the cabin was to sink a sump hole, a six-foot sump hole, in order to accumulate the water that leaked through the workings, to keep the bottom of the cut dry.

Now, all the testimony shows this is free-running, and not packed gravel. The witness has testified that this dredge has worked in river gravels that were not cemented.

Now, I have asked him the question, supposing the hypothesis to be that this were a free-running gravel, not cemented, whether in his judgment this dredge which he builds would recover the gold on this property.

Mr. McMillan: May it please your Honor, if the witness has established his qualifications, I have heard no testimony that he has ever operated one

(Testimony of William Howard Mead.)

of these equipments in this kind of gravel or elsewhere. He has simply given us a good description of the equipment, but as to his operation, as to what he has done as a mining engineer or an expert, and the extent of his mining operations and his knowledge of mining operations, and so forth, or metallurgy or minerology, we have no foundation. If he goes ahead and qualifies himself in that respect, then there will be no objection, I respectfully submit, to Mr. Cornish [172] establishing his theory of the case—which is not our theory of the case—and upon the facts on which his witness have already testified, framing and putting to this witness a hypothetical question—I didn't see this witness in the courtroom when Mr. Morrison was testifying to all his testimony. I admit this gentleman is a very learned man, but he hasn't submitted proper qualifications as an expert to give testimony and figures——

Mr. Cornish: I will withdraw the question.

The Witness: Your Honor, I wonder if I may have the opportunity——

Mr. Cornish: Q. Mr. Mead,——

A. Pardon me.

Q. What has been the extent of your own operation of this particular unit, and the extent of your own observation, first-hand observation of the operation of this unit by others?

Mr. McMillan: I object to that question, your Honor. It is apparent now that his observations would be insufficient. He would have to operate, or direct the operation of this equipment——

(Testimony of William Howard Mead.)

Mr. Cornish: Let me break the question up.

Q. What has been the extent of your direct operation of this equipment?

A. We have been for the past——

Mr. McMillan: Just one moment.

May it please your Honor, I like to deal in the first person.

A. (Continuing): I have been, for the past nine months, sir, developing the ground on the Carson River for the recovery of six million pounds of mercury that the U. S. Bureau of Mines have records of, that were dumped into the river in the shape of free mercury and in the form of amalgam of both gold and silver. Tests I have made with that boat in the river—that I have operated, sir—prove conclusively that the values I can recover [173] with that boat, are in excess of 60 cents a yard.

Mr. Cornish: Q. Has that been the extent of your operation of this particular unit?

A. No, it has not been. I am a half-owner in that operation up there; I own a half of the boat and a half of the proceeds that will, no doubt, come from it. I believe that the dredge is to start this morning, and for your information, sir, if you would like to see it, it is seven miles east of Carson City.

Mr. McMillan: No, I am not interested in its operation.

The Witness: The boat has a record of recovering over 90 per cent of the tested values, which Mr. Van Dine, of the Yuba Manufacturing Company, can testify to. I have operated one of a test propo-

(Testimony of William Howard Mead.)

sition in the State of Nevada, 60 miles south and east of Ely, for five months of last year, recovering a small amount of scheelite, tungstic oxide.

We are now setting up one with de-watering canes, a new type of recovery equipment, with magnetic jigs to eliminate the black sands, so that the concentrates can be more easily handled, prior to shipment to South America for the recovery of tin.

That is the extent of my knowledge of the subject, sir.

Mr. Cornish: Q. Now, from your experience in operating this particular dredging unit, Mr. Mead, and assuming that the gravels on this property that is in question in this action are loose, and not cemented, in your opinion would this dredging unit of yours recover 90 per cent, or substantially 90 per cent of the gold value in that gravel?

Mr. McMillan: May it please your Honor, I object to the question on the ground that the proper foundation has not been laid. This witness has not qualified himself. This equipment he refers to, I gather, was more or less in an experimental [174] stage——

The Witness: Eight years ago, yes.

Mr. McMillan (continuing): ——during the period here under consideration, that is, from October 10, 1939, until the property was abandoned. This witness has given no testimony, or laid no foundation to show that during that period, or any other period in this region, where similar soils existed, and under similar conditions, similar gravel, similar sand,

(Testimony of William Howard Mead.)

similar bedrock, that he has operated this wonderful equipment of his upon.

Q. That is true, isn't it?

A. No, that is not true, because you missed my statement that it was operated in 1939——

Q. But you never have operated it in this vicinity, have you?

A. In this vicinity? What vicinity?

Q. That is, in Placer and El Dorado Counties, on the Middle Fork of the American River.

A. No.

Q. I am talking about the period from October, 1939, until one year and eleven months thereafter.

A. There has been no boat operating——

Q. No boat during that period?

A. (Continuing) ——in this particular area.

Q. Where did it operate during that period?

A. On the San Joaquin River, at the Friant Dam.

Q. And what were you doing at that time?

A. Digging gold.

Q. Did you do it?

A. No, I didn't do it; Mr. Baker did it.

Q. The machine at that time was purely in an experimental stage, was it not?

A. It was not, sir.

Q. It was not? A. No.

Q. I suppose you will develop this machine until where, after the war is over, it will supplant all of these other equipments? A. No. [175]

Q. Not all of them, but some of them?

A. It may.

(Testimony of William Howard Mead.)

Q. And gold can be recovered at a higher value?

A. No, gold cannot be recovered at a higher value, but at a lower cost.

Q. It will be more profitable to the mining industry? A. That is right.

Mr. McMillan: I submit my objection is well founded, your Honor.

The Court: The objection is sustained.

Mr. Cornish: Q. Mr. Mead, from your examination that you have made of the gravels on this bar, how do they compare to the gravels on the San Joaquin River in which this boat has operated?

A. Well, we dug one hole down to water level——

Q. That was dug where?

A. Well, from the cabin, it would be north——well, practically due west, I would say; practically due west from the cabin location. It was down in the flat, not on the——the contours do not show there (referring to map on blackboard)——

Mr. McMillan: When, may I inquire, Mr. Cornish?

Mr. Cornish: Q. When did you dig that hole?

A. Well, I am sorry; I don't remember. It was over two years ago, however.

Q. Over two years ago?

A. Yes; a year and three-quarters to two years ago. I am not sure of the date.

Q. You recall there is a high shelf of gravel, and it drops down, and then there is a low shelf leading to the river?

(Testimony of William Howard Mead.)

A. It was on the lower bench; it was nearer to the water than to the cabin, and the water was at low level at that time.

Q. How deep was that hole dug?

A. As I remember, we went down four feet, and the periphery of the hole—when we started—would be somewhere around 25 feet, and it was 28 feet by the time [176] we got down four feet, which proved to us that the land would slough great enough for us to take yardage at a high rate.

Q. You found, from the hole that you dug at that point, that this was a loose-flowing gravel?

A. That is right.

Q. How did it compare to the gravel in which your boat had operated in the San Joaquin River?

A. Well, it wasn't my boat which operated in the San Joaquin River, but I was on it a good portion of the time.

Q. In addition to being on the boat and seeing it operated, you did physically operate it yourself?

A. I did.

Q. And that was on the San Joaquin River?

A. Yes.

Q. How does the gravel on the middle fork of the American River compare with the gravel on the San Joaquin River, as far as the ability of your boat to dredge that is concerned?

A. Well, without more analysis, I can't answer the question accurately, but it appeared there was a bit more sand than the San Joaquin River.

Q. Was the gravel in the middle fork of the

(Testimony of William Howard Mead.)

American River as free-flowing, or less free-flowing, than the gravel in the San Joaquin River?

A. It seemed to be the same.

Q. It seemed to be the same? A. Yes.

Q. Now, Mr. Mead, from the observation you have made in the operation of your boat in the San Joaquin River, and your experience with that unit, is it your opinion that that unit would dredge and recover the gold values from the middle fork of the American River?

Mr. McMillan: At what time?

The Witness: Can I answer your question?

A. Yes.

Mr. McMillan: One moment. [177]

May it please your Honor, counsel has completed the question. I object to it on the ground that the proper foundation has not been laid.

Mr. Cornish: All right. Let me put it this way:—

Mr. McMillan: And it is a hypothetical question, in which he has not included all the proper and necessary elements.

Mr. Cornish: Q. From your observation of the gravel in the San Joaquin River, and in the middle fork of the American River, on this property, in your opinion would the unit which you have built and to which you have testified recover the gold from the middle fork of the American River, on this particular property, on the 10th of October, 1939?

Mr. McMillan: Object to the question, may it

(Testimony of William Howard Mead.)

please your Honor, upon the ground it is purely speculative, and the proper foundation has not been laid.

The Court: The objection is sustained.

Mr. Cornish: Your Honor, I don't know what more I can do. The witness has testified—I submit the question again—he has testified he has operated the unit, operated it in similar gravels, and recovered gold.

I have no intention of asking the witness how much he would recover from this property, but merely whether it was a usable unit, and I feel he has testified, so far as experience is concerned, so far as observation is concerned, so far as knowledge of mechanics is concerned—I don't know what counsel has in mind that I have left out in laying the foundation.

Mr. McMillan: I have many things in mind, may it please your Honor. He is seeking to show this witness is interested in some suction form of operation, and the witness has already testified to the short depth he has gone down into the gravel, the [178] poor examination that he made. He testified that he never actually directed any operations in similar soils; he has not gone down to an extent in this soil that we have to consider in reference to gold gravels in this case. There could be that there are boulders, there could be many kinds of soils that would interfere with the operation of this plant. It is purely speculative. The man never went in there and operated that equipment. He has dug a hole of the size he

(Testimony of William Howard Mead.)

has indicated to the Court, and I submit, may it please your Honor, that is not the type of examination and study that would qualify him to give an opinion as to what would be encountered, or what would be accomplished with the mining of this property with this equipment of his.

Mr. Cornish: May it please your Honor, there has never been any witness who has gone in on this property with any particular type of dredging equipment. The most you can ever do in determining whether a property is dredgable, before it is actually dredged, is to make your examinations of the gravel, take your particular equipment and estimate what the cost of the equipment would be, and what the recovery would be based upon the sampling. It is all a matter of speculation. It is all a matter of opinion.

Now counsel seems to take the position that before we can show what could be expected to be recovered, that someone must have gone on this property and actually operated a dredger. I don't believe counsel is correct in that contention.

Mr. McMillan: Counsel is not correct in his contention that it is counsel's contention you have to operate a dredger on this property. The contention of counsel is that counsel is contending something which, first, is purely speculative, as counsel has already insinuated in his opening statement, and, secondly, this [179] testimony as to a wonderful outfit that might have recovered more gold at less cost is, as I see the situation, time-consuming and, may

(Testimony of William Howard Mead.)

it please your Honor, an utter waste of time. What if he brought a great number of witnesses here and had them testify: "Could you use up there an outfit of two yards' capacity of this kind of machinery? What do you think about a doodle-bug operation in connection with that property?" and so forth. Purely to give testimony before your Honor of the equipment; first, its utility, and next, as to whether it is better than any other equipment in existence which may have been considered in connection with this property—it is its highly speculative nature to which I am objecting.

Your Honor will appreciate the very meager, very thin-skinned test and examination that this gentleman made on that property up there, when your Honor considers the size of the hole that he dug up there, and when we have testimony from the witness, Mr. Morrison, that there is 1,300,000 cubic yards of gravel, and when we have information before the Court as to the depth at which this gold was taken. I think it is speculative. I think it is purely thin and time-consuming.

The Court: The Court has ruled.

Mr. Cornish: May it please your Honor, it is my purpose to ask the witness merely two more questions, namely, what the cost of that plant is, and what its cost of operation per day or per yard of gravel handled is. Now, I realize that in the ultimate it is up to the Court to decide whether this plant is feasible, and I think counsel's objection goes more to the weight than to the admissibility. So far as what

(Testimony of William Howard Mead.)

gold would be recovered is concerned, I don't have that in mind. This man is merely called for the purpose of testifying to the cost of the equipment and to [180] the cost of operating it, and not what it would recover.

Mr. McMillan: Well, you haven't laid the proper foundation in that, even.

Mr. Cornish: In other words, I am not asking this witness to testify to how much gold there is in the bar, how much gold he would recover, what his knowledge of the gold in the bar is; I am merely laying the foundation to qualify him to testify to the cost of the equipment and the cost of operating the equipment.

Mr. McMillan: May I ask a question in the nature of voir dire, preliminarily?

Q. Let me ask you, Mr. Mead, you don't contend that if you went down to a depth, we will say, of 22 feet, and you encountered boulders and rough bedrock and heavy gravel, that is often the case up there in these dredging operations, that you could operate this machinery, do you?

A. Most successfully, sir.

Q. You could handle boulders?

A. Most successfully, sir.

Q. Had that machinery operated, during 1939, anywhere along these rivers?

A. Yes, sir.

Q. Where?

A. On the San Joaquin River, in front of the Friant Dam, at Fresno, sir.

Q. Any boulders encountered there?

(Testimony of William Howard Mead.)

A. We only take—do you know how our unit is built? Do you want to know how our unit is built?

Q. I really don't know, and we don't have time to go into it here. I know it is very interesting, but it is too time-consuming.

A. All right. Then to answer your question regarding boulders, we merely dig material which is two-inch minus in a 36-inch diameter circle——

Q. That is all you handle?

A. Yes. (Continuing) ——at each movement of the head. [181]

Mr. McMillan: Yes.

I still submit my objection, may it please your Honor.

The Court: The objection is sustained.

Mr. Cornish: May I ask the witness one additional question?

Q. Has your dredge operated in ground that had large boulders present?

A. Yes; on the Carson River.

Q. And what has been your experience in operating in ground with big boulders in the Carson River?

A. That the capacity of the boat jumps up appreciably, because we don't handle anything larger than two-inch minus.

Q. In other words, the larger your boulders the faster you are able to excavate or dig out the gold and the smaller substances in a given yardage?

A. That is right.

Mr. McMillan: I think I can shorten this, may

(Testimony of William Howard Mead.)

it please your Honor. If counsel simply wants to ask the witness what an outfit like that would cost, I have no objection to it, as long as he doesn't undertake to operate it.

Mr. Cornish: Q. Mr. Mead, what is the cost of manufacture and installation of this particular unit?

A. You mean the selling price?

Q. The selling price, plus the cost of installation of this unit on this property on the middle fork of the American River.

A. If the machinery could be procured and a priority could be gained to build it, it would cost in the neighborhood of not more than \$22,000. The cost of moving in would not be more than \$1,500, and by "moving in," I mean moving the material from San Francisco to the Cherokee Bar and setting it up ready for operation, which doesn't include housing for the men who operate it.

Q. How would the cost of today compare with the cost of October, 1939?

A. I am sorry, I can't answer that question. [182]

Mr. McMillan: That is irrelevant, and I don't believe the witness would know, anyway.

The Court: Well, he said he didn't.

Mr. McMillan: Yes.

Mr. Cornish: Q. And from your experience, Mr. Mead, in the operation of these units, what does it cost per yard of gravel taken into the machine to operate this unit?

Mr. McMillan: I object to that, if it please your

(Testimony of William Howard Mead.)

Honor, again upon the ground that the proper foundation has not been laid.

The Court: The objection is sustained.

Mr. Cornish: That is all, Mr. Mead.

Mr. McMillan: No cross examination.

(Witness excused.)

Mr. Cornish: Mr. Wiltsee, will you take the stand?

ERNEST A. WILTSEE,

called for the Defendants; sworn.

Direct Examination

Mr. Cornish: Q. Mr. Wiltsee, where do you live?

A. I live in the Pacific Union Club, San Francisco.

Q. And what is your business?

A. I am a mining engineer by profession, a graduate of Columbia University, Class of 1885.

Q. How long have you been engaged in the mining business?

A. There are two branches of the mining business. I have been engaged in the quartz branch of it since 1888, and in gold dredging since 1940.

Q. Gold dredging since 1940?

A. Forty years—I mean since 1900.

Mr. McMillan: Mr. Cornish, I know of this distinguished [183] gentleman. You want to qualify

(Testimony of Ernest A. Wiltsee.)

him in what way? I might be able to concede his qualifications as a mining engineer. What else?

Mr. Cornish: And his knowledge of this particular property.

Mr. McMillan: That I am not prepared to give a stipulation on. I will go this further: I will stipulate that he is eminently qualified to conduct a dredger, dredging outfit, and that he owns several of them. I will go that far.

Mr. Cornish: All right.

Mr. McMillan: As to his fundamental, preliminary qualification, his college education, his long experience as a mining engineer and all that, I will quite readily grant you that.

Mr. Cornish: Thank you.

Q. What has been the extent of your knowledge of this property? You know the property that is involved in this case? A. Perfectly well.

Q. What has been the extent of your acquaintance with this property, Mr. Wiltsee?

A. Well, I secured options on all those bars on the Middle Fork, beginning down from Murder Bar, all the way up about six miles, but I couldn't, and have not yet, succeeded ever to get an option on this property, but I was given permission to drill it and ascertain its value.

Q. By whom were you given permission to drill it? A. Mr. Stanley.

Q. Mr. Stanley? A. Yes.

(Testimony of Ernest A. Wiltsee.)

Q. When was that, Mr. Wiltsee, with reference to the 10th of October, 1939?

A. With reference to the 10th of what?

Q. 10th of October, 1939.

A. Well, I think that is the time that we drilled the property. If you have some drill logs I made, that will tell the date.

Q. I have some copies of some drill logs (exhibiting documents [184] to Mr. McMillan)——

Mr. McMillan: I wish Mr. Wiltsee would fix that date. I believe Mr. Wiltsee should refresh his recollection as to that date.

Mr. Cornish: Q. Mr. Wiltsee, referring to these drill logs of August, 1939, is that the approximate time Mr. Stanley gave you permission to drill the bar?

A. He gave me permission before that, of course. I went there after I got permission.

Q. In other words, it was before August, '39, Mr. Stanley gave you permission to make these drillings?

A. Yes.

Q. Now, in your opinion, Mr. Wiltsee, as a mining engineer, can this property be operated and mined with a doodle-bug, what is commonly referred to as a doodle-bug, a dragline, and separate boat mining operation?

A. It can be operated successfully by a sufficiently large and capable dragline—I don't call them doodle-bugs, but dragline plants, consisting of a dragline and a floating boat, in which the values are recovered.

(Testimony of Ernest A. Wiltsee.)

Q. By sufficiently large, I presume you are referring to the yardage of the bucket on the dragline?

A. Yes.

Q. And also the capacity of the concentrating device to handle the output?

A. The boat should be sufficiently large and the riffle and screen capacity large enough to make the recovery of gold from the material brought up in your bucket.

Q. In your judgment, Mr. Wiltsee, how large a capacity bucket would that be?

A. I wouldn't go in there with less than a three-yard bucket.

Q. Three-yard bucket?

A. Three-yard bucket.

Q. And with the use of a three-yard bucket, what would be the cost per yard for dredging?

A. Cost per yard?

Q. Yes. A. Well, about 12 cents a yard.

Q. About 12 cents a yard?

A. 12 cents a yard.

Q. Now, you took, or under your direction certain drilling tests of this gravel were made, you said? A. Yes.

Q. And you have given me a map——

A. Yes.

Q. (Continuing): ——and on this map correctly appears the three, six, eleven holes that were drilled on this property?

A. I couldn't tell you how many until I look at the map.

(Testimony of Ernest A. Wiltsee.)

Mr. Cornish: Yes.

Do you want to see this map, Mr. McMillan (exhibiting map to Mr. McMillan)?

Mr. McMillan: Mr. Foley, I know, wants to see it.

(The map referred to was exhibited to counsel.)

Mr. Cornish: Q. Is this the map, Mr. Wiltsee, to which you refer?

A. That is the map. Our procedure is—if I may be permitted to say it—our procedure is to locate the drill holes and get the results, and afterwards send my surveyor up and survey the location of the holes on the map, as has been done in this instance.

Q. And the various points, “A-1, A-2, A-3. B-4, B-5, B-6, C-7, C-8, D-9, D-10” and “D-11” are the positions where the holes are put?

A. Yes. Our procedure is, we number our drill holes, and then number of the line of holes in a section with letters. We run them as you see on this map. All these holes are in line in each section, and all these letters refer to sections that the drill holes are in, with the first, “A,” then “B,” “C,” and “D.”

Q. And there is what appears like a fraction—for instance, this one at A-3; you see the figure “18.0” and a line, and underneath that the figure “69.7.” What do those refer to?

A. That is the way that, for convenience, we always put them on [186] the map. We put the depth of the hole first over the bar, and underneath the

(Testimony of Ernest A. Wiltsee.)

bar the dollars and cents. We do that always in all the properties we drill.

Q. And those figures would be the depth of the drill hole——

A. The upper figures are the depths and the lower figures the value in cents.

Q. Value in cents per yard?

A. Per cubic yard.

Mr. Cornish: Have you any objection, Mr. McMillan, if I transcribe this map over here to the blackboard? This is Mr. Wiltsee's map, and I don't like to offer it in evidence, because it may be some time before he will be able to get it back, or if you have no objection, I would like to offer it in evidence and make a tracing of it, and withdraw the map and replace it with that tracing.

Mr. McMillan: Maybe I can work out a plan that will be more convenient.

There was a very good suggestion made by Mr. Stanley, may it please your Honor. He said it will only take a few minutes to have a photostatic copy made of this; the Engineering Department will do it.

Mr. Cornish: May we offer this map in evidence, then, and then I take it the United States Engineers will make a photostat of that, and that photostat may be substituted and the map withdrawn this afternoon?

Mr. McMillan: Will you have that photostat here by two o'clock?

Mr. Stanley: Yes.

(Testimony of Ernest A. Wiltsee.)

Mr. McMillan: It will be here at two o'clock, your Honor.

The Court: Very well.

Mr. Cornish: We will offer this map, with the figures thereon, [187] and ask it be marked the defendants' exhibit next in order, with the stipulation it may be withdrawn and the photostat substituted.

(The map referred to was received in evidence and marked Defendants' Exhibit M.)

Mr. McMillan: Now that the Clerk has marked it, your Honor, may I hand it to the Engineering Department for the purposes indicated?

The Court: Yes.

Mr. McMillan: I am sure you will get your map back all right.

The Witness: Thank you very much.

Mr. Cornish: Just one further question, Mr. Wiltsee:

Q. You have no interest in this property at the present time?

A. No, sir, I haven't any interest at all.

Mr. Cornish: You may cross examine.

The Court: Well, it is twelve o'clock. We will recess until two o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p. m.) [288]

Thursday, November 18, 1943

2:00 o'clock p.m.

ERNEST A. WILTSEE,

recalled for the Defendants; previously sworn.

The Court: You may proceed, gentlemen.

Mr. McMillan: May it please your Honor, during the lunch hour we had the photostatic copies made of Defendants' Exhibit M, so I am going to return now to Mr. Wiltsee the original.

The Witness: Thank you very much, Mr. McMillan.

Mr. McMillan: Mr. Cornish has a copy, and the other copy, with the original exhibit endorsement of the Clerk, I hand to the Clerk.

Had you concluded your direct examination?

Mr. Cornish: You were cross examining at the lunch hour, Mr. McMillan.

Mr. McMillan: No, but I will proceed.

Mr. Cornish: I thought you were. If not, I have not concluded—I have a couple of more questions I would like to ask Mr. Wiltsee.

Mr. McMillan: No, I haven't asked any questions on cross examination yet.

Direct Examination
(Resumed)

Mr. Cornish: Q. Mr. Wiltsee, you are interested, I believe you said, in a portion of the American River, the Middle Fork, both below and above this property?

A. Yes. I have under lease all the river, the

(Testimony of Ernest A. Wiltsee.)

dredgable river below, and even above Mr. Miedel's property.

Q. Both sides of this property, but not this property itself? A. Not this property itself.

Q. Now, it is your intention to dredge the Middle Fork of the [189] American River?

A. I will dredge the whole river. I have two plants I am going to move over there, one for the upper bar, beginning at Poverty Bar and going on up, and the other is the large rig I have over in Oroville, where we have been working the Feather River for several years—and, of course, the Feather River is a much larger river than this, and much more turbulent in the winter, much higher water—and as soon as I get through with my dredging at Oroville, which will be some time in May, I will remove the portable plant—that is, if the Government will be good enough to permit me—and go over and work on the lower part of the American.

Q. In your opinion as a mining engineer, Mr. Wiltsee, could this property which is involved in this section be mined with equipment similar to yours on a profitable basis?

A. Oh, certainly. I have paid over \$20,000 in royalties holding these properties until I can get around to them, until the war is over and I can get at them, and there isn't any question at all that—there is very little hard bedrock—I don't remember that we had a hard bedrock hole in Mr. Miedel's property—the records will show—while in the lower part of the American there is some bedrock, but that is

(Testimony of Ernest A. Wiltsee.)

not a great obstacle with us with these heavy drag-line buckets. With these heavy buckets we can go into that bedrock as far as we want to, take plenty of time, and clean that bedrock perfectly. In fact, I believe a dragline dredge can clean bedrock far more efficiently than a bucket line dredge. That has been my experience, and I have been interested in dragline dredging since 1900.

Q. In your opinion, Mr. Wiltsee, as a mining engineer, this equipment you have on the Feather River, or equipment similar to it, with a three-yard bucket, would clean the bedrock and get [190] substantially all the value?

A. Oh, yes. In all the years' experience in drag-lining we have had we have found the dragline dredge to be the most efficient in bedrock. We have come onto 25, 30, and 35 cent ground, and we have come within one or two cents a yard in recovery of our drill values. Those are according to my records.

Q. And you believe that can be done on this bar?

A. Oh, yes; no question.

Mr. Cornish: That is all.

Cross Examination

Mr. McMillan: Q. You don't know of any better method than yours for recovery of gold values?

A. No; by experience, Mr. McMillan, because we have been working there along the Feather for four years now, and we have had no trouble whatsoever. We have recovered right up to our drill values, and personally, while I am familiar with all these differ-

(Testimony of Ernest A. Wiltsee.)

ent methods of dredging, I don't think there is anything for river dredging which will compare to a big dragline plant, because the difference between the dragline rig and the bucket line dredge is that the dragline rig is more portable, more easily moved. If you have got a bucket line dredge, it is part of the boat, and it is a great big, cumbersome outfit, and these things are detachable—here is a photograph of the plant we have on the Feather River, if you would like to look at it (handing photograph to Mr. McMillan).

Q. Yes; I think his Honor would like to look at it (handing photograph to the Court).

I will ask it be received in evidence as illustrative of the witness' testimony.

The Court: Admitted. [191]

(The photograph referred to was received in evidence and marked U. S. Exhibit No. 2.)

The Witness: The bucket line dredge is a part of the boat, and it is a great, big, cumbersome affair. The dragline is separate from the boat, and you can move around, and you can prepare for high water very much more easily than you can with the bucket line boat. There are one or two bucket line boats that are lying along this river above there that were swept away by high water. They were caught before they could get ready for the high water. But with the dragline rig you can always provide protection for your boat, keep it up next to the bank, and the dragline can always scramble ashore if you have to. The dragline rig is the one I have found to be the most

(Testimony of Ernest A. Wiltsee.)

practicable in river dredging, and I have had over 40 years' experience.

Mr. Cornish: May it please your Honor, I forgot to ask Mr. Wiltsee one question. In regard to the permission to go on the property and drill these holes, he spoke to me during the recess and told me he wanted to straighten it out in his testimony.

Q. You testified this morning that Mr. Stanley had given you permission to go on the property and drill these test holes. You wanted to explain that?

A. I do. I said I had Mr. Stanley's permission. Here is what happened: I had Mr. Morrison's permission to go in there, and then I learned that the Government had either condemned it, or had an option on it, or something, so knowing Mr. Stanley, I called him up and said, "Stanley, I have a drill ready; I want to go over there and drill that Spanish Bar. How about it?"

He said, "I don't give a damn."

So I said, "All right, I will go ahead."

That is exactly the conversation that took place.

The Court: Quite positive language.

The Witness: Yes. I thought it meant that I could go ahead, so I went ahead.

Mr. McMillan: Q. Mr. Wiltsee, there was some testimony here this morning about some equipment, some sort of a suction method of recovery. Have you heard of that?

A. Yes. I have seen and heard of suction dredges all over this country for the last 40 years, ever since I have been here.

(Testimony of Ernest A. Wiltsee.)

Q. And they don't amount to much in your opinion?

A. And there was never one of them that was a success, to my personal knowledge, Mr. McMillan, and I think I know. I have seen 35 or 40 of them.

Mr. McMillan: What was the name of the particular one you had this morning, Mr. Cornish?

Mr. Cornish: No particular name. It was Mr. Mead's equipment.

Mr. McMillan: Q. Do you know anything about that?

A. No. They are all right when you are working in the bed and handling mud and that sort of thing, but you have to recover gold, and gold is heavier than mud; it is heavier than quartz; and you have to have something that is more positive than suction, I think. And when you got down to bedrock I think they would have trouble with those boulders. This may be all right, I don't know, but at least I have never seen a successful one yet. I have seen a lot of failures. I am not going to say this is not successful. It may be entirely different from all the others.

Q. That is, it may become so some day?

A. I beg your pardon?

Q. It may become so some day? A. Yes.

Q. Mr. Wiltsee, I didn't get it clear in my mind this morning— [193] in making those tests up there, you used a drill method?

A. We used a churn drill, just like they use in a water wheel, and the reason we use a churn drill is because those churn drills have been proven to be

(Testimony of Ernest A. Wiltsee.)

the most reliable tools for prospecting for dredging that have been devised since I have been in this business, and I only went into this business in 1900, and we know from our records and the companies in California using the churn drills—and they are almost always the same size, No. 3 Keystone is the standard—the results of their operations during all these years in which the dredging companies have been working have showed those results are reliable, and that is why we have used them. We have standardized our drilling methods; we always use the same sort of drill and the same method of handling it.

Q. Well, that method of drilling holes you used in drilling the holes in this property there, from your experience that is as satisfactory and as approved a method as can be found? A. Yes.

Q. Now, did I understand you to say, Mr. Wiltsee, that if you went in there you would go in there with your three-yard equipment?

A. I would use two rigs. I would use the three-yard rig on the upper end, because that is shallower, and I would use the five-yard equipment on the lower end, because that is deeper. You see, that five-yard equipment can dig down to 55 feet without any trouble.

Q. That equipment costs money, doesn't it?

A. The equipment we have at Oroville cost \$155,000.

Q. The two equipments?

A. The dragline and the boat and the mechanical equipment we have up there cost \$155,000. Of course,

(Testimony of Ernest A. Wiltsee.)

you wouldn't need all that on the American. We had a [194] contract with the city there to build the levees higher and wider up there, and we built the levees 140 feet wide and six feet higher than the regular levees, and we had to use a bull-dozer to handle the boulders and the work on the levees, because there was a lot of boulders up there. That is a much larger stream than the Middle Fork of the American.

Q. Well, you wouldn't advise anyone to go on that property with any lighter equipment?

A. No, nothing less than three-yard equipment.

Q. As I understand it, Mr. Wiltsee, you have options on pretty near all the claims on the Middle Fork of the American?

A. I have everything tied up above and below Mr. Miedel's property. I have \$20,000 up in advance to hold them.

Q. Yes. Well, owning all this equipment, and owning options on all these pieces of property, under those circumstances you wouldn't be running a very great risk as to whether you could profitably mine it?

A. You mean I would be running a risk?

Q. I mean,—I have this thought in mind: It is not clear in my mind. If you didn't have all this equipment and all these options on other mines up there——. You know this piece of property. Would you want to go in on this piece of property alone and buy machinery just for this piece of property?

A. I would rather not; I would rather have the rest.

(Testimony of Ernest A. Wiltsee.)

Q. You what?

A. I would rather have the rest. You are going to ask me if I would go in on that alone?

Q. No. It could be mined more profitably——

A. Much more profitably having these others.

Q. Yes. I was examining those drill holes. I see one there, I think it is marked—what is the number of that, D or B—I [195] think that you will recognize it; it went down to 16 or 18 feet, somewhere around there, and it ran \$3.00.

A. It did, yes.

Q. That is a pretty hot hole, is it?

A. Yes. In my mind, I never averaged that hole in fully. You see, the other holes averaged just under 25 cents, and I didn't think, under the laws of average and my experience in this business, that I could put that hole in there and count it all the way, but I think it will go 35 cents through the influence of that hole.

Q. But you, yourself, with your experience, you would throw that hole out?

A. I don't know that I would throw it out entirely, but I wouldn't put it in entirely.

Q. As soon as you saw something like that, I imagine that a gentleman of your experience would say, "Let's dig some other holes around here," wouldn't he?

A. There was another hole down on Green's property that ran over \$2.00, and I dug some other holes around it, but not on this property.

Q. Well, that would be your practice, wouldn't it?

A. Usually would.

(Testimony of Ernest A. Wiltsee.)

Q. It would, is that not true?

A. As high as that?

Q. Yes.

A. Well, you usually—when we drilled at Oroville, we had one hole that ran well over \$3.00, and we never gave that full value—you understand what I mean—I didn't throw it out, but I didn't include it entirely. But if you are asking me what this property would go, I am positive it will go 25 cents, and I believe it will go 33 to 35 cents.

Q. That is, all of the property?

A. No; I am talking about Mr. Miedel's property.

Q. Well, I am talking about Mr. Miedel's property, too. That is the one we have under consideration here.

A. That is the one I am talking about; not about the others. I [196] know it will go 25 cents, and I believe it will go 33 to 35 cents through the influence of that hole.

Q. Take that property, did you have occasion to make a survey to establish the cubic yardage of workable gravel?

A. Yes.

Q. What was that?

A. Well, 600,000 cubic yards, and maybe a little more, according to our measured survey.

Q. Well, as a result of those tests made, and averaging them up, and your experience that you have had all these years, and knowing that yardage, what do you think that property would go? What would be the average?

A. The average value of the property?

(Testimony of Ernest A. Wiltsee.)

Q. Yes.

A. Oh, I think it would dredge from 33 to 35 cents a yard, and 600,000 yards would be—well, that is about \$200,000.

Q. Then what did you say the cost was of dredging operations of that kind?

A. Well, that dredging operation?

Q. Yes.

A. About 12 cents a yard.

Q. Twelve cents a yard? A. Yes.

Mr. McMillan: I think that is all, Mr. Wiltsee.

Mr. Cornish: That is all, Mr. Wiltsee.

(Witness excused.)

Mr. Cornish: May it please your Honor, I desire to be sworn and testify concerning certain negotiations leading up to the filing of the answer, negotiations between Mr. Miedel and his representatives, and representatives of the United States Engineers and the United States Attorney.

FRANCIS T. CORNISH,

called for the Defendants; sworn.

Direct Examination

The Witness: My name is Francis T. Cornish,— [197]

Mr. McMillan: May it please your Honor, I am at a loss to see the relevancy of this testimony, or

(Testimony of Francis T. Cornish.)

its competency. These negotiations leading up to the filing of the complaint—they were never consummated to the extent that they entered into an agreement—and these negotiations that they talk about after the condemnation suit was filed have no relevancy. We are here concerned with a condemnation suit.

I have never objected to it before, because a lawyer is—in a case of this kind a lawyer is always in an awkward position. The Court wants to get a full, elaborate picture of everything. But I believe your Honor has a full picture of all these negotiations since that time. We are trying a condemnation suit; we are not trying negotiations between parties that never resulted in an agreement. And those negotiations, your Honor knows what they were already. It is a matter of time-consuming process in giving testimony that I am concerned with now. As I say, I never objected to it before, but for the life of me I can't see the relevancy. However, it is all in now, and if your Honor is not concerned about taking what, in my opinion, is merely time-consuming testimony, Mr. Cornish might go ahead.

Mr. Cornish: If I might step down from the stand a moment, your Honor.

The Court: Yes.

(Whereupon Mr. Cornish left the witness stand and stood at the lectern.)

Mr. Cornish: In Mr. McMillan's opening state-

(Testimony of Francis T. Cornish.)

ment he has referred to the fact that an answer was not filed in this case until March, 1941, although the suit was filed in October, 1941. It is the purpose of this testimony to show by documentary evidence that in the preliminary negotiations with the United [198] States Government, when Mr. Miedel and his associates were asked to place a price upon the gravel, that at first written offers were submitted to the Government based upon a royalty basis, whereby the Government would pay only for that gravel which the Government actually took out, and would pay on a percentage, depending upon the place where the gravel was taken; that in those offers a proposition was submitted whereby the price that was paid would be dependent upon the gold recovery, so that if the gold recovery reached a certain point the gravel would be free to the United States; that this proposition was turned down, and other propositions were made based upon a royalty basis; that in the negotiations with the United States Government it was explained to the Government——

Mr. McMillan: May it please your Honor, counsel is in a dual capacity here. He was sworn as a witness——

Mr. Cornish: I am making an offer of proof. I stepped down from the stand, Mr. McMillan, because you made an objection. I am not at this time testifying.

(Testimony of Francis T. Cornish.)

Mr. McMillan: You are simply making an offer of proof?

Mr. Cornish: Simply making an offer of proof.

If your Honor understood this was testimony, there is no intention of it being so considered.

(Continuing) ——that the explanation was made to the then United States Attorney, now Judge Hjelm——

Mr. McMillan: Pardon me for interrupting, your Honor. I was concerned about the whole thing being time-consuming. If your Honor wants to hear the testimony, well and good. Now, this is just as time-consuming now, in the nature of things,—in fact, more time-consuming. If your Honor wants to hear the testimony, counsel might as well resume the stand. [199]

Mr. Cornish: Well, you objected, and I came down from the stand to explain the purpose of this testimony.

It is our purpose to show that the United States wanted to pay a cash sum, rather than paying for the amount of gravel actually removed; that the United States offered to do certain things in consideration of having this placed on a cash figure, because the United States didn't want to limit itself as to whether, or how deep, or as to the quantity of gravel they would take; and that even after the landslide, and even after they abandoned the property, when the defendants made a request for permission to go on the property, to disregard the order for exclusive possession and allow the de-

(Testimony of Francis T. Cornish.)

defendants to go on the property and mine the property, that written request made to the United States Attorney for permission to mine the property remained unanswered; that then the proposed answer of the defendants was taken to the United States Attorney's office, and the United States Attorney was told that unless we had some definite commitment as to when this work was going ahead, it would be necessary for us to file the answer; that the answer was withheld in the first instance because the inducement was made first, that Washington had to confirm the deal; and second, that the landslide had upset the matter so that they didn't know on what basis they would go through; third, it was thought that negotiations might be made by the Government to permit Mr. Miedel and his associates to enter upon the property and mine it; and finally, they were unable, a year and a half after the condemnation suit started, to get any definite commitment from the Government as to what their stand was, and the answer was filed.

Now, Mr. McMillan has criticized the taking of a year and a half to file the answer, and it is merely to corroborate the [200] testimony the witnesses have already given——

Mr. McMillan: May I interrupt to say I don't believe that Mr. McMillan criticized. I simply referred to that as a significant fact, that the delay was caused by these title matters and other matters. I simply put it in the form of explanation of a delay for reasons I thought substantial.

(Testimony of Francis T. Cornish.)

Mr. Cornish: I wish to show, your Honor, that the title had nothing to do with it; that since August 14, 1940, efforts were made to work out some sort of a commitment, and that finally it was necessary to file the answer in May, 1941.

Now, that is the purpose of that testimony, your Honor.

I believe it is relevant, because it certainly shows the right that the United States Government sought to acquire, which was not to pay so much a yard for the gravel they took, but to have a free reign to take any gravel they might see fit to take from any place on the bar they might see fit to take and at any depth in the bar they might see fit to take. In other words, the United States Government preferred to pay a full cash price, rather than so much a yard for the gravel they took.

I believe that is material from that standpoint, your Honor, and that is the purpose of offering the testimony, and I believe the testimony will substantiate it.

Mr. McMillan: May it please your Honor, the whole matter under consideration here—it is conceded we were in possession for one year and eleven months of the easement that we took; that we sought to abandon the proceeding finally, but were denied that right. But we did give notice of abandonment one year and eleven months after the suit was filed, and they have had the property since that time.

Now, the whole consideration before the Court

(Testimony of Francis T. Cornish.)

is this: It is [201] conceded they were kept out of the use and occupancy of that property for one year and eleven months. Now, because they were kept out of the use and occupancy of those premises for one year and eleven months, the whole thing with which we are concerned here is what is the just compensation to be paid the defendants for that use and occupancy for one year and eleven months?

We are not trying negotiations. Because after a complaint is filed and counsel comes in and talks about negotiations, unconsummated negotiations, that certainly wouldn't be the basis of a lawsuit. They are coming in now in this particular instance just like they would go in a court of claims and seek damages for the use and occupancy of the premises for a definite time, one year and eleven months. What else can there be, may it please your Honor? Certainly they are not trying to seek exemplary damages from the Government. It is the value of the use and occupancy of the premises for one year and eleven months that is before the Court now, and that there were negotiations up to that time, or negotiations after that, whether there was good faith or bad faith, are not questions before your Honor. The question before your Honor now is, having conceded we were in the use and occupancy of those premises for one year and eleven months, what is the value of that, and what was their loss by reason of that? That is what is before the Court, and all these matters he wants

(Testimony of Francis T. Cornish.)

to show are purely irrelevant, in my humble judgment, and I have always understood that they were, but, as I said, I was in an awkward position, I didn't desire that anything be taken from the Court in order that the Court have a full picture of the matter, but I think that the Court has the full picture now, and I submit my objection that these matters are utterly incompetent, irrelevant and immaterial. [202]

Mr. Cornish: May it please your Honor, it is true, as Mr. McMillan says, that the damages to the defendant by reason of the deprivation of use of their property are material. There is no question about that. But Mr. McMillan omits, in his argument, that instead of condemning anything tangible, the Government condemned an incorporeal right, that is, the right to take gravel. They didn't want to limit themselves as to the amount that they would take; they didn't want to limit themselves as to the location at which they would take it, or the depth they would go. In other words, in addition to excluding the defendants from the possession of the property, they sought the right to take whatever gravel they might see fit to take.

These conditions, which are incorporated in the complaint, your Honor, and which I have read, were conditions which were thrown about the taking in order to, as best as the parties were able to work it out together, safeguard the rights of the defendants in the gold as distinguished from the gravel, so that no matter how deep the contractor went,

(Testimony of Francis T. Cornish.)

and no matter where the contractor took the gravel, that the gold, whether little or much, would belong to, be the property of, and retained by the defendants, and to that extent minimize the damage of the defendants by reason of being excluded from the privilege of mining this property as a mining proposition, and not as an adjunct to a stationary gravel plant.

Now, while it is true that the United States Government did file an abandonment on the 13th of September, 1941, the United States Government abandoned a right which it had for a year and eleven months. They did not abandon anything tangible; they abandoned an incorporeal right. They could have abandoned this piece of property, had they condemned the property; had they [203] sought to take the property.

Had they condemned 100,000 yards out of the total amount of gravel on the property, they could have abandoned that, because they never took it. But rather than condemning anything tangible they condemned an incorporeal right.

Now, it is my contention that the cost, the value of the right which the Government condemned, must be determined as of the time the Government went into possession.

Now, what your Honor's test is going to be, whether it is going to be based upon the assumption that the Government would take 100,000 cubic yards of bank run; whether it is going to be based on the assumption that the Government might wish

(Testimony of Francis T. Cornish.)

to pave the roads, and take 200,000 cubic yards of bank run; or whether it is going to be based on the assumption that the Government had the right to use the whole bar if they saw fit, I cannot say at this time, but it is our contention that in that consideration the damages of the defendants by reason of that taking are material, because in taking that right the Government was going to do certain things: They were going to furnish all the water that they felt was necessary to wash this gravel; they were going to furnish all the power that they felt was necessary to operate the concentrating devices; they were going to dig all the gravel that they felt was necessary to dig, and raise it to a certain elevation, at a point where it could be carried through these concentrating devices by force of gravity and without mechanical means. That was the value on which the Government sought to condemn this property, and Mr. Miedel and Mr. Morrison stated—Mr. Miedel stated that they shook hands on this deal, because they considered that all these considerations, the digging of the gravel, the carrying away of the tailings, the furnishing of the power and furnishing of the water, was of value to them. In other words, they contemplated in the sale of the gravel, your Honor, they contemplated the reservation of the gold.

In the negotiations with the United States Engineers, the testimony will show if we are permitted to establish it, that we asked the Government to put in the devices that were necessary in order to

(Testimony of Francis T. Cornish.)

save this gold, devices along the lines that the defendants were to design in advance, and permit the contractor to have these devices, and when the project was over the Government could have the salvage and the defendants would take the gold. All the Government had to do was to make adequate provisions for the recovery of the gold satisfactory to the defendants, and they could have the gravel for nothing.

The United States Engineers replied they weren't in the gravel business; that this was a contractor coming in to handle the gravel; and this contractor could be required to furnish power; required to furnish water; required to elevate the gravel; but he could not be required to actually extract the gold from that gravel once he had separated it from the bar. And the defendants were asked to place, as a cash consideration for their consent for taking this gravel, that amount of money which they felt would be adequate to permit them to furnish gravel concentrating devices, rather than the Government to furnish them, so the Government would not be in the mining business. So far as the Government was concerned, they wanted the right to go in there and take whatever they saw fit to take, and the cash value of that right is a value that must be determined as of the time the Government took it.

Now, I realize it is an ironic situation to say that the Government must pay for something which they never took. If the [205] Government was

(Testimony of Francis T. Cornish.)

buying gravel, to say that the Government must pay for gravel when they didn't have gravel is not right. But the Government wasn't taking gravel; they were taking a right, a right to take gravel if they saw fit to do it, and contemplating that this project would go ahead the defendants were willing to delay their mining operations long enough to permit the Government to complete that project, providing that arrangements were made for them to get the gold.

I don't say that the United States Government have not acted in good faith. I don't say that if you take a thing up with the United States Attorney or the U. S. Engineers, that they don't have the final say, but we do say that the Government sought to take a right as distinguished from anything tangible. That is the purpose of the testimony, your Honor.

We will show the final offer which was made to the Government, which consisted of two letters written by myself to Judge Hjelm. in which we outlined the conditions, and that those conditions that we outlined were never accepted by the Government—tentatively, yes, but so far as we were advised, they never met with the approval of the authorities in Washington, and that consequently no money was ever paid over; that even after the contractor had started in to operations, even after he had taken possession and contemplated putting in his gravel plant, that efforts were made to procure some sort of commitment from the United

(Testimony of Francis T. Cornish.)

States as to whether it would go ahead on this basis, because the defendants were placed in a position where they didn't know, five months after this suit was filed, they didn't know on February 28, 1940, when the landslide at the site of the dam occurred, they didn't know at that time if Washington would approve this sort of a deal; they didn't know whether they were [206] safe in buying special equipment they would need with a stationary plant, or whether the United States would elect to take, under the option, the gravel and the gold, or whether the United States would elect to take the gravel and recover the gold—which would mean a wrangle with the United States as to whether we were getting all the gold or the contractors were keeping some of it as it went over the devices.

I realize this is a peculiar case. It is not like the ordinary condemnation suit, where they take an easement to travel over the property. If all they took was an easement for a power line, or an easement for a road, it would be easy to determine the value of the use of that property. But when they take a right to remove minerals, which, in law, as your Honor knows, is not called an easement at all, as the complaint calls it, but it has a very definite concept in the law, namely, a profit; namely, the right to remove minerals or anything else from the ground and appropriate it to your own uses. That is the very situation we have——

Mr. McMillan: May it please your Honor, is

(Testimony of Francis T. Cornish.)

counsel going into an argument on the entire case? I made an objection that the testimony he offered to give here was irrelevant, and I again repeat the reasons in short, your Honor: It is very much like—all oral negotiations between parties are superseded by a written instrument; that is, that written instrument, if the terms are within the four corners of the plans, supersedes the oral negotiations in the absence of any fraud.

Now, these negotiations were had, but what happened? A complaint was filed in eminent domain, and certain things took place afterwards. Counsel speaks of the rights we were going to take, the gravel we were going to take, the uses we were going to [207] make of the property. Now, it must be obvious to your Honor that we never took any of those things. We never took any gravel, we never took any gold, we never took anything. What negotiations were had as to how much water was to be furnished, how much electricity was to be furnished, and what Mr. Miedel said to Mr. Hjelm, and what Mr. Hjelm said to Mr. Miedel, and “we shook hands on it”—we are not trying handshakes here, your Honor; we are not trying negotiations that were never consummated. We are trying a condemnation suit. We had the use and occupancy of a piece of property for one year and eleven months——

The Court: The Court is ready to rule. The objection is sustained.

Mr. Cornish: Mr. McMillan, have you in your

(Testimony of Francis T. Cornish.)

possession a letter from myself to Judge Hjelm dated May 22, 1939?

Mr. McMillan: I haven't it right here, but I will search around here.

Mr. Martin, or Mr. Seawell,——

Mr. Cornish: I would like to offer it in evidence.

Mr. McMillan: Mr. Foley has well suggested that it may run counter to the ruling which the Court has already made. Is it something admissible notwithstanding the ruling of the Court?

Mr. Cornish: I believe so.

Mr. McMillan: What do you seek to show by this document? Of course, if we have it, we will find it. We have this file here, and you realize I came into this case long after the landslide, even——

Mr. Cornish: I realize that, Mr. McMillan.

Mr. McMillan (continuing): ——but if you will state to the Court——

Mr. Cornish: The document I desire to offer, your Honor, [208] consists of three letters; one is a letter dated May 27th, to the Honorable G. B. Hjelm, United States Attorney, Sacramento, offering an assignable option to take sand and gravel, exclusive of free metallic mineral content, from the property, subject to certain conditions, which letter was acknowledged by Mr. Hjelm under date of June 10th, stating that certain conditions were feasible, and that certain conditions therein stated were not feasible, and culminating in a letter to Judge Hjelm under date of June 14, 1939, in which

(Testimony of Francis T. Cornish.)

the suggestions of Judge Hjelm were in part approved and in part disapproved, and it is the contention of the defendants that those three letters define the right which the Government sought to condemn, that the specifications in the complaint were drawn pursuant to these three letters, and that it was the desire of the Government not to condemn gravel as gravel, but to condemn the right to recover gravel, to remove gravel, as distinguished from the tangible thing itself.

Now, those three letters, your Honor, give the background of, and the explanation of, the peculiar situation which appears in this complaint on pages 4, 4-A, and 4-B, the things which the defendants had a right to do in order to protect their rights, subject to which the condemnation was taken.

Mr. McMillan: We respectfully submit, may it please your Honor, it is squarely within the ruling of the Court. I am at a loss to understand on what theory counsel thinks letters of this character are admissible. If negotiations are carried on for a long time between parties—for example, seeking to purchase property by direct purchase, and we have in mind this property and that property, and changes may come about, or they may not come about, and finally, for reasons, good reasons, an action in eminent domain is filed. Is it possible in a condemnation [209] proceeding—laying aside the nature of this proceeding, which is not altogether a condemnation proceeding; it is to assess damages for use and occupancy—but in another

(Testimony of Francis T. Cornish.)

relative proceeding, is it possible we are going back in a condemnation suit ordinarily and say "You shouldn't have condemned this property, you shouldn't have taken so many lots; the descriptions of the lots when we were discussing them and trying to get them by direct acquisition was thus and so; you were to do this and you were to do that, and we were to do this and we were to do that in the matter"? Are we concerned here with a negotiation and discussions? No; we are one step beyond the negotiation stage; we are one step beyond the discussion stage. A condemnation suit was brought, in which it was sought to take certain things, to have certain uses, to have an easement.

Now, none of those uses took place except we remained in occupation and use of this property for one year and eleven months.

Now, what was the damage suffered by the defendants by reason of our use and occupation of this property for one year and eleven months? That is the issue here. What was the value? What was the loss to defendants because we were in possession of that property?

Let us assume we were in possession of the whole of their property during that time. Assume we kept them out of the use and occupancy of their property during that time. Now, they contend they could not mine the property. Now, whether or not they could have mined the property, or would have mined the property, we contend, is highly conjectural and speculative, and in that respect the taking

(Testimony of Francis T. Cornish.)

did not amount to appropriation; it only amounted to frustration, as I pointed out the other day. [210]

We state they are entitled to the value of the use and occupancy of that property for one year and eleven months. We took no gravel, and we took no gold, and they still have both, and it is just as easy to mine that property profitably after the war as it was at that time.

That is what we are determining here, that issue, —What was the value of the use and occupancy of that property for one year and eleven months? And I repeat my objection to this offered testimony.

The Court: The objection is sustained.

Mr. Cornish: May I state, your Honor, I can't agree with Mr. McMillan that the only issue involved is the value of the use and occupancy?

Mr. McMillan keeps talking about the Government taking gravel. My point is these letters will show that the Government wasn't taking gravel; the Government was taking a right, as distinguished from a physical thing itself; that the Government didn't desire to take any tangible gravel from any particular place, but that the Government wanted a right to go in there and take gravel as distinguished from the physical gravel itself.

Now, if you have a right to do something, if you have a right to walk up and down the halls of this corridor for two years, and you never walk up and down the halls of this corridor for a year and eleven months, how can you turn back that

(Testimony of Francis T. Cornish.)

right? How can you say because you never exercised that right that you didn't have that right, and that right was worth something to you?

Now, it is our contention that you must distinguish between the physical gravel itself and the right to take the gravel, because without this right the Government would have been subject to a breach of contract suit with its contractor on the project, [211] because they agreed with the contractor that he could take gravel on this property, have the right to come in on this property and take gravel. Even before this condemnation suit was filed they had made a contract with the contractor that he could come in on this property, without cost to the contractor except the cost of his machinery and the cost of operating it; that the contractor himself was paying nothing for this gravel. That meant that the Government, on the basis of that, was able to let a contract to a contractor for a lesser figure, because the contractor knew that he didn't have to go out and buy the gravel; that the gravel in place would be furnished to him. And in this condemnation they weren't asking for anything tangible, but a right to protect themselves, to save themselves from a breach of contract suit by the contractor with whom they had already agreed could come in on the property, and at the time that they made that agreement they had no right to come in on the property and take gravel.

Perhaps I am wrong in my presentation, perhaps I didn't make myself clear that the Govern-

(Testimony of Francis T. Cornish.)

ment was not condemning anything tangible, but they were condemning a right they had to have in order to protect themselves against a breach of contract suit by their contractor. They didn't know what they were going to take; they didn't know what their contractor was going to take. It isn't like the United States Engineers were going in on this property. They were turning it over to the contractor to use in whatever manner he saw fit to use it. They didn't know that he would use only approximately 75,000 cubic yards——

Mr. McMillan: May I interrupt again, may it please your Honor? Is counsel contending that this condemnation suit was brought to protect the Government against the contractor?

Mr. Cornish: I am contending that at the time this [212] condemnation suit was filed this contract had been let to Mr. Pollock——

Mr. McMillan: And that we brought this suit to protect ourselves against Mr. Pollock?

Mr. Cornish: You brought the condemnation suit to comply with your contract with Mr. Pollock, your contractor.

May it please your Honor, at the time this condemnation suit was filed the Government was under no obligation to provide any gravel for this dam. The Government had merely let a contract to Mr. Pollock, and in fixing the price at which he would do this work had made an agreement with Mr. Pollock that he could come on the property and get gravel without any cost other than the cost of refining the gold.

(Testimony of Francis T. Cornish.)

The Court: The Court has ruled.

Mr. Cornish: The defendants rest.

(Defendants rest)

Mr. McMillan: Is that the defendants' case?

Mr. Cornish: It is.

Mr. McMillan: May it please your Honor, it is close to the hour of recess——

The Court: Yes; we will take a ten-minute recess.

(Recess.)

Mr. Cornish: May it please your Honor, after closing, the thought occurred to me that we didn't offer in evidence the leases which are attached to the answer, and I understand that Mr. McMillan will stipulate that those leases may be offered in evidence for the purpose of defining the rights of the respective defendants in the property.

Mr. McMillan: Not for the purpose of defining any rights of [213] the defendants, they are a part of the answer, may it please your Honor, and they may be offered in evidence, and there is no objection to their being introduced in evidence, but they will speak for themselves.

Mr. Cornish: Yes, that is satisfactory, your Honor.

The Court: Yes; so ordered.

(The leases referred to were attached to the Answer.)

Mr. McMillan: Mr. Fraser.

(Whereupon Mr. McMillan exhibited a document to Mr. Cornish.)

Mr. Cornish: If you want to offer that in evidence, Mr. McMillan, tell me what the tests show and I will stipulate——

Mr. McMillan: Mr. Cornish, I thank you very much, but these gentlemen, these experts, can give the Court better information than I can. I will try to make it brief.

Mr. Cornish: All right.

Mr. McMillan: Thank you, but I would prefer to have the witness explain it.

JAMES B. FRASER,

called for the Government; sworn.

Direct Examination

Mr. McMillan: Q. Your name is Mr. James B. Fraser?

A. Yes, sir.

Q. And what is your position?

A. At present I am associate engineer, U. S. Engineer Office.

Q. Stationed at Sacramento?

A. Stationed at Sacramento.

Q. And how long have you been so occupied?

A. Well, I have been with them since February 7, 1918.

(Testimony of James B. Fraser.)

Q. I will show you here a map or drawing, and I wish you would just tell the Court and the rest of us what this purports to be [214] (exhibiting document to the witness).

A. Well, that is a survey we made in August, beginning the 27th, up to about the 1st of September, of what is known as Cherokee Bar.

Q. Well, that is the property here under consideration, isn't it? A. Yes, sir.

Q. And it reads on this map, "Boundary Survey and Contour Map of Cherokee Bar, Located on the Middle Fork of the American River, in one drawing, Scale 1"—

A. One inch equals 200 feet.

Q. 100 feet, isn't it? A. Yes, 100 feet.

Q. "U. S. Engineer Office, Sacramento, California, September, 1942. Approval recommended. V. L. Glaze, Senior Engineer." And what is this name (indicating)—"H. M."— A. Reich.

Q. "Reich"—"Head Engineer." What is this name down here (indicating)?

A. I don't know.

Q. Well, that is not a matter of great importance at this time. Mr. V. L. Glaze, he is the senior engineer, and he directed that this map be made?

A. Yes.

Q. This work be done? A. Yes.

Q. This survey? A. Yes.

Q. Now, tell us in detail what this survey is. When did you go up there and what did you do?

A. Well, we went up there on the 27th of

(Testimony of James B. Fraser.)

August for the location of the cross-sections of the contours and location of the test holes that had already been put in.

Q. What kind of test holes? For what?

A. Well, I understand they were put in by Mr. Bishop's orders, for the location—— [215]

Q. How many test holes?

A. Well, there were eight, I think.

Q. Well, aren't there nine?

A. Nine, yes, sir.

Q. What other information is shown on that map?

A. Well, just the river and the bars.

Q. What river? A. The American River.

Q. Middle Fork, isn't it?

A. Middle Fork of the American River, yes.

Q. Now, was a survey made there to show the amount of gravel?

A. That is what it was for; the cross-sections was for that, the exposed gravels on the bar.

Q. Well, just tell us how that was made and what was done in connection with its making. In other words, describe it fully, so that the Court will understand it—the Court will understand it, I know, much better than I can, however.

A. We started from the section—

The Court: Place it on the blackboard.

Mr. McMillan: Have you any objection to this being introduced?

Mr. Cornish: No.

Mr. McMillan: It may be introduced in evi-

(Testimony of James B. Fraser.)

dence, then, as the Government's exhibit next in order.

The Court: Admitted.

(The map referred to was received in evidence and marked U. S. Exhibit No. 3.)

Mr. Cornish: Mr. McMillan, what is the bearing and distance of the south boundary of that property.

Mr. McMillan: Mr. Cornish, Mr. Fraser will tell you all about that. He knows more than I do, I am sure of that.

Q. Now, will you please answer Mr. Cornish's question, Mr. Fraser?

A. The bearing was south 89, 55 west; and the distance I don't [216] exactly see on here. When we run into the slide we didn't try to establish any corners of the property. Our sole purpose of the survey at that time was to locate the test holes, cross-section the bar, and get the bends and the yardage.

Q. Go ahead, please, and tell us——

A. Well, we started on this corner (indicating), and went on a bearing——

Q. Which corner?

A. From this section corner up in here (indicating), triangulated down on this bar; chained back 200 feet to our triangulation point; ran a chain of transverse up along the top of the bar; then ran levels over and from these stations along here (indicating); we cross-sectioned from our lines across the bar, across the river to the opposite west bank, and in the same way we cross-sectioned

(Testimony of James B. Fraser.)

to the toe of the hill on the left bank—east bank—we did that every hundred feet. And then on the west bank, for our sections, we angled and crossed for the cross-sections, and where we didn't hit the bank we took stadia shots to determine the curvature of the bank on the other side. Then from here (indicating), we got the test holes, took levels on the tops of them so they could be plotted.

Q. Does that map undertake to give a survey of the acreage of workable gravel?

A. I would say it would, yes.

Q. Well, does it? A. Yes, sir.

Q. And as computed under that survey, how many cubic yards of exposed workable gravel?

A. Yes, that was computed, but not under my—I don't know about the yardage, how much I computed.

Q. Isn't it 535,000 cubic yards?

A. That is what I understand it was.

Q. It is not shown on there?

A. No, I don't see it on [217] this map.

Q. Now, those test pits are located on that map? A. Yes.

Q. All nine of them? A. Yes, sir.

Q. And there is shown on the map the results of the tests made, is that correct? A. Yes.

Q. Does it show alongside the test pits the log of the tests? A. No, they don't.

Mr. McMillan: I think the other day you tried to get some information, Mr. Cornish. It wasn't

(Testimony of James B. Fraser.)

clear in my mind what you wanted to get. Maybe you can clear it up by asking this gentleman now.

Mr. Cornish: May it please your Honor, I merely called to Mr. McMillan's attention, when he offered the first diagram, that a question was raised as to whether the west boundary of the river was correctly shown, or was estimated, and your Honor will recall on the drawing which is behind this——

Mr. McMillan: Well, that was just put in there as a vicinity map, and was just to give His Honor a general idea of where the property was.

Mr. Cornish: In other words, Mr. McMillan, you are satisfied that both banks of the river are on this property, and that the river does not extend over, as shown on the original drawing?

Mr. McMillan: That is correct. And are you satisfied that this drawing here correctly represents the area of workable gravel?

Mr. Cornish: Well, each one I see is a little bit different.

Mr. McMillan: We don't intend to offer any more——

Mr. Cornish: I can't object to the witness testifying that that is the way it looked to him, but it doesn't exactly [218] correspond to our survey. I think every one of the surveys up there are a little different, may it please your Honor.

Mr. McMillan: Are you willing to accept that?

Mr. Cornish: I would like to question the witness about it a little, first.

(Testimony of James B. Fraser.)

Mr. McMillan: Very well.

Mr. Cornish: Q. Mr. Fraser, in surveying this property, did you find any of the test holes on the bar to the west of the river?

A. The only ones we found were those that we have located there on the map.

Q. And those would be the test holes that are marked "Test Hole 1," "Test Hole 2," "Test Hole 3," "Test Hole 4," "Test Hole 6," "Test Hole 7," "Test Hole 8," "Test Hole 9"?

A. Yes, sir.

Q. I take it on this survey you surveyed the river with reference to its position on the 80 acres—or 40 acres?

A. No; we surveyed the river in reference to the bars. In other words, we didn't try to lay out any section lines, or anything like that, or any property corners; we just made a direct survey of the bar.

Q. In other words, so far as you know, this south boundary might be down a ways or up a ways?

A. It could be, yes.

Q. And the north boundary might be further south or further north?

A. Or further north, yes.

Q. And actually what you were doing was not trying to place the bar with reference to its position on the 80 acres?

A. No, sir.

Mr. McMillan: Forty acres, isn't it?

Mr. Cornish: Forty, yes.

Mr. McMillan: 40.34.

(Testimony of James B. Fraser.)

Mr. Cornish: Q. But merely to measure the size of the bar [219] and show on the map which you made the amount of gravel in that bar?

A. Yes.

Q. And that survey, Mr. Fraser, was directed to that portion on the inside of the bend, and didn't apply to the portion on the west side?

A. No, it cross-sectioned the bar on the west side, both.

Q. You included—now, how much of the bar on the west side did you include in this estimate of 537,000 cubic yards?

A. Well, I didn't work it up, but I assume the whole bar was taken in.

Q. Well, Mr. Fraser, if you didn't accurately fix the north and south boundaries of the east half of the west half of the southeast quarter, how can you tell that your computation of gravel in the west bar was accurate?

A. Well, that I couldn't say, because we have that one corner to start from, and I understood at that time that there was some dispute about these corners around up there (indicating), so we didn't try to—we got out far below where the test holes were, and what was apparent to me, the section that they wanted surveyed——

Q. Well, the main section they asked you to survey was the inside of the bend, wasn't it?

A. Well, it was that whole area in there I surveyed.

(Testimony of James B. Fraser.)

Q. Did they ask you to survey the west side of the river? A. Well,—yes.

Q. And do you recall how much gravel you found on the west side of the river and how much you found on the inside bend?

A. No, I don't.

Mr. McMillan: Q. Well, what you were undertaking to do, Mr. Fraser, was this, in brief: was to ascertain there, regardless of corners, the gravel there that was exposed and workable for [220] mining purposes, isn't that it?

A. Yes, sir.

Q. And that survey shows that, and that would be about 18.1 acres, is that correct?

A. About that, yes.

Q. And 527,000 cubic yards?

A. 527,000 cubic yards.

Q. Did you have anything to do with the drilling of the holes? A. No, sir.

Q. When you got through that survey your job was finished? A. Yes, sir.

Mr. McMillan: That is all.

Mr. Cornish: No further questions, your Honor.
(Witness excused.)

Mr. McMillan: Mr. Bishop.

ARTHUR F. BISHOP,

Called for the Government; sworn.

Direct Examination

Mr. McMillan: Q. Your name is Arthur F. Bishop? A. Yes, sir.

Q. And you are a member of the firm of Bishop & Lord? A. Lord & Bishop.

Q. Oh, Lord & Bishop? A. Yes.

Q. That firm is engaged in what business, Mr. Bishop?

A. We have been in the contracting business, and mining.

Q. By "contracting business," does that have anything to do with dredging or construction?

A. Well, the contracting business has been mainly structures, concrete structures; dams, bridges, and so forth.

Q. You are located here in Sacramento?

A. Yes, sir.

Q. How long have you been in that business?

A. Since 1919.

Q. Have you ever owned, or do you own any dredging outfits now? [221] A. Yes.

Q. How many? A. We own three.

Q. You still have them? A. Yes, sir.

Q. Have you operated dredgers up and down the American River and elsewhere?

A. Yes, sir—not on the American. We haven't been directly in the American, but along the west slope of the Sierras.

Q. Well, tell us, especially for the information

(Testimony of Arthur F. Bishop.)

of His Honor, some of your operations, the extent of your work in mining.

A. Well, we operated near Redding in two locations; on the Feather River above Oroville; up in the vicinity of Slough House in Sacramento County; on the Calaveras River in Calaveras County. That takes in most of them. There are a few more.

Q. How large are the dredgers you own?

A. We own two yard and a half dredgers, what they call dragline dredgers.

Q. Are you familiar with the property here under consideration? A. Yes, sir.

Q. Have you known about it for a long while?

A. Well, just since about a year ago last August.

Q. Have you had any familiarity with comparable property in that neighborhood?

A. Yes.

Q. Other gravel bars and mining claims?

A. Well, south of this is Calaveras County, where we mined, gravel bars similar to it.

Q. Have you been called as an expert witness in other cases for the Government?

A. I appeared in this court one time.

Q. I think you testified not long ago before His Honor in the Smithers case, didn't you?

A. Smithers, yes.

Q. Which was tried here. I call your attention to that survey on [222] the map, Government's

(Testimony of Arthur F. Bishop.)

Exhibit 3. You know about that survey, don't you? A. Yes, sir.

Q. Did you have anything to do with making the test up on the property?

A. Yes; I was requested by the engineers to make arrangements for competent drilling and testing of the bars.

Q. About when was that?

A. That was a year ago last August; that was in 1942.

Q. Will you just proceed and tell us about it, please?

A. Well, after I received the instructions to proceed, I contacted the General Dredging Company of Natomas, California, and arranged with their management to have these drill tests down there with competent men and equipment.

Q. Then what did you do?

A. Well, I didn't do anything—I had nothing to do particularly with the testing myself. I was up there on two different occasions while it was being done, and according to my observation it was handled in the ordinary and competent manner.

Q. Well, you had charge of directing the work, supervising the work?

A. Yes. We—or I spotted the locations of the holes where I thought would be a proper place to get the values and the quantities involved.

Q. Have you ever done work of that kind before? A. Yes, sir.

(Testimony of Arthur F. Bishop.)

Q. Many times?

A. Quite a number of times, yes, sir, in trying to locate property for our mining projects.

Q. Are those test holes there, test pits, located on that map (indicating), about as you thought they should be located?

A. Well, that is the way I asked them to be dug, yes.

Q. Exactly as you asked them to be located?

A. Yes.

Q. And you know, yourself, that the tests were made? A. Yes, sir. [223]

Q. Who did you have up there with you making the tests?

A. Well, the General Dredging Company had it under charge of Mr. Dorian and Mr. Nicholsan, who did the drilling and were on the ground during the actual work there.

Q. Wasn't there a gentleman up there named Mr. Giddings?

A. Mr. Giddings, who handled the work for the General Dredging Company.

Q. And he was there supervising, too?

A. Yes, he was there more often than I.

Q. And who is Mr. Giddings?

A. Mr. Giddings is one of the owners of the General Dredging Company.

Q. You are familiar with the results of those tests? A. Yes, sir.

Q. You know how each pit ran?

A. Yes, sir.

(Testimony of Arthur F. Bishop.)

Q. It is shown there on that survey, is it not?

A. Yes. I have a record of it.

Q. And you have seen the log that was kept?

A. Yes.

Q. And the depths?

A. Yes, I have a record of the depths.

Q. Everything? A. Yes.

Q. As I understand, you are familiar with property up there in that neighborhood?

A. In the locality, yes.

Q. Did you make a particular investigation and examination to determine the market value of this property?

A. In the ordinary way, yes; I determined in my own mind what it would be worth to us.

Q. I will give you a date, now. I will give you the date October 10, 1939. What, in your opinion, as a result of your study and examination of this property, and keeping in mind and taking into consideration as a factor as to enhanced value to determine the [224] highest and most profitable use to which this property might be put in the reasonably near future—I might interrupt to ask you another question: You are familiar with the tests which were made by Mr. Wiltsee?

A. Yes, sir.

Q. That were introduced here today? You have familiarized yourself with those tests?

A. Yes, sir.

(Testimony of Arthur F. Bishop.)

Q. You have heard his testimony and know the results of his tests, do you? A. Yes, sir.

Q. Now, keeping that all under consideration, the enhanced value of that property up there by reason of this gold-bearing gravel, basing it upon, if you please, as high as 600,000 cubic yards—in the first place, what would you say is the highest and most profitable use to which that property could be put on October 10, 1939, the date that the summons was issued in this case?

A. Well, I would say dragline dredging.

Q. Mining? A. Yes, dredge mining.

Q. Now, what in your opinion and judgment was the reasonable market value of that property, taking into consideration these tests, the enhanced value, and all the uses to which it could be put, including the most profitable and highest use to which it could be put, its market value on that date?

Mr. Cornish: To which we object, if the Court please,—

Mr. McMillan: Q. (continuing) The entire property.

Mr. Cornish (continuing):—on the ground it is incompetent, irrelevant and immaterial, and not the test of damages.

The case of Board of County Commissioners of Roosevelt County versus Good, 105 Pacific Reporter 2d, page 470; 4 New Mexico, 495, citing a number of authorities, is to the effect that where the condemnation seeks not the property itself, but

(Testimony of Arthur F. Bishop.)

the mineral value in the property, that the test of the value of [225] the right taken is the value of the mineral, as distinguished from the value of the land itself. Had they sought to take the land, it has to be the value of the land, but since they sought to take the mineral in the property, the test is the value of the mineral which they sought to take.

I think your Honor is no doubt familiar with that decision. It is the Board of County of Commissioners of Roosevelt County versus Good, 105 Pacific 2d, 470, which, to the extent of our research, is the latest pronouncement on that question.

Mr. McMillan: May it please your Honor, the case to which Mr. Cornish refers is a case where specifically only the gravel and sand was taken. There was no other use taken in connection with the property. That was all, and it was actually taken. It then became necessary to fix the value of it necessarily separately.

Our contention is that the value of this property, in view of the fact that nothing was taken whatever, was the market value of the property at the time of the taking, with the gold in place, and I desire to pursue that for a few moments to make it clear, if I may.

The Court: You may.

Mr. McMillan: I am not reading, your Honor, from page 799, 20 Corpus Juris, Section 246 (reading):

“Where the land taken contains mineral, the

(Testimony of Arthur F. Bishop.)

measure of compensation is the market value of the land with the minerals in it, and the value of the minerals cannot be shown separately.”

It is to be remembered always in this case that we didn't take separately only the gravel and sand. We took other uses incidental to the construction of this project, and we took an [226] easement of two years over this entire property.

Now, many cases are cited in the footnote of that completed work and in 29 Corpus Juris Secundum, page 1043, Section 174. One of the cases cited I will read briefly from to your Honor, and call your Honor's attention to—United States versus Montana Railway Company versus Warren, reported in 137 U. S., 348; reported also in 11 Supreme Court Reporter, page 96—that volume I haven't here with me. But I am now reading from the case of Forest Preserve District of Cook County versus Caraher, reported in 132 Northeastern, page 211; also reported in 299 Illinois, at page 11 (reading):

“The rule is that compensation must be estimated for the land as land, with all its capabilities, and if there is timber on it, or coal, oil, or other minerals under the surface, they are to be considered so far as they affect the value of the land, but they cannot be valued separately. Trees were a component part of the land, and there was no justification for admitting evidence of what could be realized by separating the timber from the land as personal property.”

(Testimony of Arthur F. Bishop.)

The opinion then states (reading):

“Not only was it error to allow the value of the trees when converted into lumber to be estimated separately, but the inevitable effect of such testimony as was admitted would lead to all sorts of collateral issues as to expenses, transportation, and other matters taken account of by the witness, which would be confusing in the extreme.”

As here, the cost of machinery, if we put machinery in there [227] of a certain size, and the market conditions, and the seasonal conditions—that would all enter into the value of this gravel.

And a decision similar to that, holding exactly the same, is the case of Morton Lumber Company, I think it is—a very well known case—it is Morton Timber Company versus United States, 91 Federal 2d, 884. In that case it was sought to value the timber separately from the land itself, and the Court held, for reasons similar to those expressed in the decision I just read, that whilst their enhanced value may be taken into consideration, that it is timber, fir, and it has great value; you may take all that into consideration, as you may in the consideration of the highest and most profitable use to which a property may be put, just like a reservoir site, you may take all that into consideration, and if a property has sugar pine, and the very best forest on it, that is enhanced value to be taken into consideration, because the most profitable use it could be put to would be for, we will say, recreational site purposes, or for lumber purposes, but

(Testimony of Arthur F. Bishop.)

you cannot sit down and start in figuring that by putting in a lumber plant and cutting down those trees, and with the state of the market, and all that, the value of the trees would be so much. You would not consider them separately; you would consider them on the land, in arriving at its highest and most profitable use, its market value, taking into consideration its highest and most profitable use.

In *City of Los Angeles versus Deacon*, reported in 119 California Appellate Reports, page 491, reading from page 492, the Court said (reading):

“The admission of evidence as to the net profit made in operating a rock and gravel plant on the property being condemned in this action, was error which, [228] it is our opinion, requires a reversal of the judgment.”

Then the Court goes on to state and fix quite fully what may be asked on direct examination and what may be asked on cross examination.

But on the point in this case, as far as that is concerned, that should be considered with and as a factor in forming the opinion as to the highest market value of the property at the time of taking, taking into consideration the enhanced value, here is a leading case—it is a case in which the State Highway Commission condemned a piece of property in the State of California, and in that property there was a lot of sand, a great quantity of sand, I believe, and it was contended that that should have been valued separately, and value

(Testimony of Arthur F. Bishop.)

given to it aside from the market value of the land, and it was held in this decision (reading):

“In such action the defendants were not entitled to prove, as an element of damage, in addition to the general damage sustained by virtue of the taking of the condemned strip of land for highway purposes, plus any severance damages which might have been suffered, the market value of sand and gravel which were taken from borrow-pits on the borders of the condemned lands and used in constructing the causeway adjacent to the pits from which said sand and gravel were taken, where the value of such sand and gravel was included in the general damages assessed in the taking of the land.”

The Court: That is sufficient.

Mr. Cornish: May it please your Honor, I am familiar with that rule, and I know it is the rule where they take the land itself. [229]

Now, had the Government taken the land itself in this case, like the State Highway Commission in taking land to be used as a public highway, or condemning land for a park, that has trees on it, that is the rule. But this is an exception, as laid down in the New Mexico decision which I cited to your Honor, and there are a number of Supreme Court decisions cited, that where the Government seeks to condemn the mineral resources themselves, as distinguished from the land itself, they must pay the value of the mineral resources.

Now, the specific question in that case, as in this,

(Testimony of Arthur F. Bishop.)

was this: The defendants had rock which the plaintiff wanted to use as paving rock. The defendants sought to prove that that rock had a value mixed with cattle feed, and had for that purpose a much higher value than paving rock. The Government said in the first place they were condemning only paving rock; they weren't condemning cattle feed. And in the second place, at any event they could not be held for more than the value of the land. The Supreme Court of New Mexico held that it was error for the Court to preclude the defendants from showing this higher value that the defendants had, because instead of condemning the land itself, the plaintiff condemned the minerals in it.

Now, similarly in this case, the Government was condemning not the use of the property for two years; they were condemning the right to take gravel for a period of two years, and since they were condemning the right to take gravel, the value to be determined is the value of that right to take gravel as distinguished from the value of the land itself.

Now, it is the defendants' contention that they are not bound by the market value of the property, because we know that after this suit was filed, on August 28, 1940, the United States [230] of America sold this land, and confirmed that by a land patent, for \$2.50 an acre, which would make a total price of \$100 for the entire piece of property.

Now, if we are limited in our recovery to the market value of the property, it can well be argued

(Testimony of Arthur F. Bishop.)

that we paid only \$100 for this property, and we are not entitled to collect any more; but since it was the mineral they sought to take, as distinguished from the land itself—it would be comparable to a situation where the Government wanted to run a highway over property that was oil-bearing. If the Government only condemned a right-of-way over that property, or condemned the surface rights, as distinguished from the mineral and oil rights, you couldn't make them pay for the oil and minerals. On the other hand, if the Government wanted to take that oil itself, as distinguished from the surface, then the Government must take into consideration, in fixing the price, the value of the mineral it seeks to condemn.

The Court: The objection is sustained.

Mr. McMillan: Q. Do you remember my question, Mr. Bishop?

A. Yes.

Q. Now, I am emphasizing this: I want you to keep in sight this, the enhanced value now of that property by reason of the gravel carrying this gold, and I want you to keep in mind this factor, that you are familiar with these gold tests, the fact that you have heard Mr. Morrison's testimony; that you have heard Mr. Wiltsee's testimony; and that you are familiar with the tests that were made by the Government under your supervision. Keep that all in mind. Now, you know that those tests were, and you may base it, if you please, upon the yardage which was given by Mr. Wiltsee—that is to say,

(Testimony of Arthur F. Bishop.)

600,000 cubic yards, at least. What then, in your opinion, was the fair market value of that [231] property at that date? Now, I mean the whole property, everything, with all its enhanced value, and I mean in fee, not for two years.

Mr. Cornish: Same objection, if your Honor please. Your Honor just sustained that objection.

Mr. McMillan: No; your Honor sustained the right to ask that question.

Mr. Cornish: I understood your Honor said, "The objection is sustained." I might have misheard your Honor.

Mr. McMillan: You misheard his Honor.

Your Honor sustained my right to ask that question.

Mr. Cornish: I understood your Honor to say the objection is sustained. Possibly I misheard your Honor. May I refer to the reporter's notes?

(Record read by the reporter.)

The Court: I intended "Overruled."

Mr. Cornish: The objection is overruled?

The Court: Yes.

Mr. Cornish: May it be stipulated, Mr. McMillan, to save repetition of our objection, that any questions that you ask the witness as to the value of the property are objected to by us on the same ground, and I won't have to be jumping up all the time, and the Court has overruled the objection that that is not the proper test of value in this case?

Mr. McMillan: Correct.

(Testimony of Arthur F. Bishop.)

A. In my opinion, to me it would be worth between twelve and thirteen thousand dollars.

Q. I am talking about in the open market, on a cash sale, a person knows that property up there, and it is put up in the open market for sale, and a buyer comes along—it is not put up under forced circumstances, but under free circumstances, and a buyer comes [232] along and he has the cash. What would you say would be the market value of the property?

Mr. Cornish: I object, if the Court please, on the further ground that there is no foundation laid; that this witness has not been qualified as an expert on pricing property; that he has merely been qualified as a contractor, as a driller, and having done some mining, and it is not on the valuing of mining property or real estate in this vicinity, and as far as mining is concerned, in fact, by his own testimony he has not had any experience any closer to this property than in Calaveras County.

Mr. McMillan: Q. In answer to that, Mr. Bishop, will you proceed to state what properties you have purchased, what mining properties you have been interested in, and what properties your company and yourself have gone ahead and leased? On a royalty basis, that is.

A. Well, I will just go over those same operations that we have had in the past on the Feather River and the Gray's Flat.

Q. Well, did you ever buy any property, any mining property?

(Testimony of Arthur F. Bishop.)

A. Yes, we bought that particular property I mentioned.

Q. Yes. Have you ever purchased property, or leased property on a royalty contract?

A. Yes. That is——

Q. Mining property?

A. That is how we have done most of our—we get most of our land through royalties.

Q. Many of them?

A. Well, I would say about 10 or 12, something like that.

The Court: Q. Have you had any experience in the valuation of land?

A. I have not appraised lands in general, no.

Mr. McMillan: Q. But you are familiar with the values of mining property?

A. Yes, sir, I am.

Q. You have had experience in that regard?

A. Yes. [233]

Q. And this is a mining claim, is it not?

A. As I understand it, yes.

Q. You have seen it and know the property?

A. Yes.

Mr. McMillan: I submit that the witness is sufficiently qualified as to this property.

The Court: The objection is overruled.

Mr. McMillan: Q. What would you say would be the cash market value—that person who buys the property to have the same knowledge that you have with reference to its enhanced value?

(Testimony of Arthur F. Bishop.)

A. I would say between twelve and thirteen thousand dollars.

Q. Not to exceed that? A. No, sir.

Q. That is for the entire property?

A. Yes.

Q. Now, what would you say would be the fair rental for its use and occupancy for one year and eleven months?

Mr. Cornish: Same objection, if the Court please, on the ground that this witness has not qualified as having the knowledge of value of use and occupancy of property; and furthermore, that it doesn't appear for what purpose.

Mr. McMillan: Any purpose.

Mr. Cornish: You mean as a farm, as a mine, or what?

Mr. McMillan: Q. No; mining claim. Just to be in use and occupation of the property, without taking anything from it. Put in possession of it.

Mr. Cornish: To which we object, if the Court please, on the ground it is incompetent, irrelevant and immaterial. This action involves the condemnation of a right to take gravel, and not the right to use property for two years and take nothing from it.

Mr. McMillan: Well, obviously, may it please your Honor, if you have a right to take gravel to use in the construction of [234] something, you must go on the property; you must build roads; you must have the use of the property. And that is ob-

(Testimony of Arthur F. Bishop.)

viously the reason for taking a two-year easement. You are going to use the property to take gravel.

The Court: The objection is overruled.

Mr. Cornish: May I state, your Honor, we don't contend that this property has any rental value apart from the minerals in it? In other words, the question Mr. McMillan has asked is, What is the value of the use and occupation of this property for a period of one year and eleven months? I am willing to stipulate it is not worth more than a dollar a month, except for the fact that someone might want to take minerals from it. The Government did not condemn the use and occupancy of this land; they condemned the right to take gravel from it, and even to take the gold from it if they saw fit. And I don't see how the value of the use and occupation of this property alone, without considering any other rights that the Government had the privilege to enjoy, although they didn't enjoy them, had anything to do with the question before the Court here.

Now, if your Honor considers that is material, I will concede that a dollar a month would be a fair and reasonable rental for this property.

Mr. McMillan: No; I propose to fix the value, and if counsel believes that there is no way to fix that value, it is out contention, then, that that value should be fixed by a reasonable rate of interest on the value of the property.

Mr. Cornish: I am perfectly willing to stipulate, Mr. McMillan, that the reasonable rental value

(Testimony of Arthur F. Bishop.)

of that property for the use and occupation, without taking anything from it, is a dollar or less—in fact, I will stipulate it has no value without [235] the right to take minerals.

Mr. McMillan: I don't care to take the stipulation. We will make our proof, may it please your Honor.

The Court: Proceed.

Mr. McMillan: Q. What would you say that the use and occupation of that property for one year and eleven months, the property which you say would have a market value of from twelve to fifteen thousand dollars—just to be in possession of it, and not to take anything from it?

A. Well, I would say that the figure should be about the same.

Q. In other words, you say that to be in possession of that property for one year and eleven months, that a person should pay \$15,000 for that?

A. Well, that was my opinion.

Q. For the rental value for two years, and not to take anything from it; not to mine it or do anything with it?

A. Yes; under the conditions, yes.

Mr. McMillan: Well, there is a great misunderstanding on my part.

The Court: There must be a misunderstanding.

Mr. McMillan: Q. I am talking about what should be the rental. You say that the property was worth twelve to fifteen thousand dollars?

A. Yes.

Q. The cash value of the property?

(Testimony of Arthur F. Bishop.)

A. Yes.

Q. On that date? A. Yes.

Q. Now I am asking you, the property being of that value, the fee, to be in the possession of the property for one year and eleven months, and not to mine it or do anything with the property—just to be in possession,—what would be the value of that? A. Oh, I beg your pardon——

Q. I think you misunderstood me, Mr. Bishop, and grossly so, isn't [236] that true?

A. Yes, I misunderstood you. I would say it would be worth no rental.

Q. You would have to fix it, then, on some theory, as I have indicated; upon an interest basis, reasonable interest basis on the value of the property, is that true?

A. That is what I tried to work out as the value of the property, the interest on what that property should return.

Q. That is, the interest on the value of that property for one year and eleven months, a reasonable rate of interest? A. Yes, sir.

Q. On the value of the property?

A. Yes, sir.

Q. Which was not higher than \$15,000, as I understood you? A. Yes.

Mr. McMillan: You may take the witness.

The Court: Well, it is so close to adjournment time. Did you wish to take up the two minutes that are left?

Mr. Cornish: No, I think we will take longer

than the two or three minutes that are left, your Honor.

The Court: The Court will adjourn until tomorrow morning at ten o'clock.

(Whereupon an adjournment was taken until Friday, November 19, 1943, at 10:00 o'clock a. m.) [237]

Friday, November 19, 1943

10:00 o'clock a. m.

The Clerk: United States versus 40.34 acres of land.

Mr. McMillan: Ready.

Mr. Cornish: Ready.

ARTHUR F. BISHOP,

recalled for the Government; previously sworn.

Mr. McMillan: May it please your Honor, may I ask the witness one or two more questions? There is something I should have introduced in evidence yesterday,—

Mr. Cornish: I have no objection, your Honor.

Mr. McMillan (continuing): —for the information of the Court and everyone.

Direct Examination

(Resumed)

Mr. McMillan: Q. I observe on this Government's Exhibit No. 3, a survey showing the tests

(Testimony of Arthur F. Bishop.)

for gold made on the property here under consideration, the 40.34 acres of land, that there is no log shown; the depths are not shown, and whilst there is here test hole depths, it is incomplete for the information of the Court, and I want to get those logs introduced in evidence.

Mr. Bishop, those tests were made under your direction and supervision, were they not?

A. Yes.

Q. However, Mr. Dorian panned the gold, did he, and kept the record? A. Yes, sir.

Q. But under your direction and supervision?

A. Yes, sir.

Mr. McMillan: Have you any objection to the introduction of these tests?

Mr. Cornish: No, I haven't, Mr. McMillan. [238]

Mr. McMillan: Q. How many documents are there there?

A. The field log sheets on nine holes and the gold samples.

Mr. McMillan: Well, I will introduce this document. This is a field log. As the Government's exhibit next in order. That would be——?

The Clerk: 4.

Mr. Cornish: May I see it first, Mr. McMillan?

Mr. McMillan: And I am going to have him, Mr. Cornish, read it to his Honor. I think I can get copies to give you later on.

This will be Government's Exhibit 4.

The Court: Admitted.

(Testimony of Arthur F. Bishop.)

(The field log referred to was received in evidence and marked U. S. Exhibit No. 4.)

Mr. Cornish: Do you want him to read it, or are you going to read it?

Mr. McMillan: I am going to have him read them.

Q. Will you read these (handing exhibit to the witness)?

A. Do you want them in their entirety?

Q. Yes; I want them all read in.

A. This is Field Log on Hole No. 1:—

Mr. Cornish: May I interrupt you just a moment?

I take it, Mr. McMillan, that he is going to read these in sequence, from 1 to 9? He refers to Hole 1, Hole 2, and so forth; that is, the holes that are marked by numbers on the map, United States Exhibit 3?

Mr. McMillan: Correct.

The Witness: Do you want the depth of the hole, and value, or do you want all this other information?

Mr. McMillan: I want the depth of the hole, the value as you go down; read the prices, the depths, and the color, and the [239] gold at the depths; and finally the yardage, and how much it ran per cubic yard. Start in with Test Hole 1.

A. Test Hole No. 1—

Q. Read it to his Honor, Mr. Bishop.

A. Depth—it is headed “Depth of pipe”—is

(Testimony of Arthur F. Bishop.)

three feet in this first case, and the pumping three feet, and the core was two feet three inches, the measured core was 450 cubic feet. River sand, small gravel.

The second depth was four feet, the pumping four feet one inch, the core was one foot one inch, the cubic feet was 300, the total estimated milligrams—there was a trace of gold in this; river sand and small gravel.

The third was five foot depth, pumping five foot, the core was one foot four inches, cubic feet 175, and a trace of gold. Sand, small, medium and fine gravel.

The third was six feet in depth, pumping six feet one, core was six inches, the measured core was 150 cubic feet, and there were two No. 3 colors; medium and fine gravel and sand.

The next was seven foot seven inches, pumping seven foot seven inches, core was eight inches, 225 cubic feet, with a trace of gold; loose gravel and sand.

The next was eight foot six inches, pumping eight foot eight, core was ten, cubic feet 200, a trace of gold, loose gravel and sand.

Nine foot six was the next, with the pumping nine foot eight, the core nine inches, 200 cubic feet, no gold showing; loose gravel and sand.

The next was ten foot six, with pumping of ten foot seven, the core three inches, 100 cubic feet; there were 20 No. 3 colors and one trace, which is

(Testimony of Arthur F. Bishop.)

a very, very small indication of gold; [240] coarse gravel and sand was the formation.

Eleven foot six was the depth of the pipe, pumping eleven foot six, the core was nine inches, the measured core was 150, with six No. 3 colors and one trace; medium and coarse gravel.

The next depth is twelve foot one inch, the pumping twelve foot two, the core was nine inches, 175 cubic feet, 10 No. 3 colors, one trace; gravel and bedrock.

Bedrock was thirteen feet, and they pumped to thirteen feet, with a core of one foot four inches, with a trace of gold.

They drilled into the bedrock 14 feet, pumped 14 foot one inch, the core 11 inches, and the measured core of 225. Bedrock is the formation.

Mr. Cornish: Q. Does that report give the total depth of the hole?

A. The total depth of hole, yes.

Q. Will you read that again?

A. The total depth of hole,—they hit bedrock at 12 feet—12 foot one inch, and drilled into bedrock to 14 feet. This is Hole No. 2——

Q. And does that also give the value on that log?

A. Yes, it will give the value. The value as determined was six cents per cubic yard. There were 7.5 milligrams of gold recovered in the hole. Now, on this log sheet it notes here 12½ feet of calculated depth, but you will note they drilled into the bedrock.

Q. In other words, 12 feet and one inch to bed-

(Testimony of Arthur F. Bishop.)

rock, and then one foot and 11 inches into the bedrock?

A. Well, there is a difference in there that—it isn't exactly clear, but it says gravel and bedrock, you see, at that 12-1, and then 12½ feet is where they calculated the quantities.

Mr. McMillan: Q. I notice on that sheet there is a gentleman whose name is J. L. Nicholson, that worked with the panner, R. E. Dorian. He, too, worked under your supervision? [241]

A. Yes, sir.

Mr. McMillan: I fear, your Honor, this may be a long drawn out agony, to have him read to your Honor all those. Let's see if I can devise a better method.

Q. Have you there a computation?

A. I have a tabulation here showing the number of holes, the calculated depths, the milligrams of gold recovered, and the value per yard as determined.

Mr. McMillan: Yes.

Now, may I introduce this in evidence as Government's exhibit next in order?

Mr. Cornish: Are you going to read that, Mr. McMillan?

Mr. McMillan: I will read it, yes.

Mr. Cornish: Because if not I will copy it off.

Mr. McMillan: I would like to have His Honor have the information. I understand there is no objection.

The Court: Admitted.

(Testimony of Arthur F. Bishop.)

(The tabulation referred to was received in evidence and marked U. S. Exhibit No. 5.)

Mr. Cornish: This is a synopsis of the drill logs which the witness started to read?

Mr. McMillan: Yes. It only gives the depth, the weight of gold, and the value per cubic yard.

Bar No. 1, depth $12\frac{1}{2}$ feet, weight of gold 7.5 milligrams.

Q. Is that right? A. Yes, sir.

Mr. McMillan: Value per cubic yard six cents.

Bar No. 2, 13 feet, 100.6 milligrams, 77 cents.

Bar No. 3, or Test Hole No. 3, $15\frac{1}{2}$ feet,—

Mr. Cornish: Fifteen and a half?

Mr. McMillan: Yes; $15\frac{1}{2}$. [242]

Weight of gold, 58.7 milligrams; value per cubic yard, 37.4 cents.

Bar No. 4, $24\frac{1}{2}$ feet depth; 55.2 milligrams, weight of gold; value per cubic yard, 22.5 cents.

Mr. Cornish: What was the depth of that again, Mr. McMillan?

Mr. McMillan: Twenty-four and one-half feet.

Test Hole No. 5: Depth, 20 feet; weight of gold, 78.2 milligrams; value per cubic yard, 39 cents.

Test Hole No. 6: Depth, 19 feet; weight of gold, 61.6 milligrams; value per cubic yard, 32.2 cents.

Test Hole No. 7: Depth, 16 feet; weight of gold, 45.7 milligrams; value per cubic yard, 28.2 cents.

Bar No. 8: Depth, 21 feet; 118.2 milligrams, weight of gold; value per cubic yard, 56.2 cents.

Test Hole No. 9: Depth, 20 feet; weight of gold, 28 milligrams; value per cubic yard, 14 cents.

(Testimony of Arthur F. Bishop.)

Q. Do you happen to have the gold there?

A. Yes, sir.

Q. How many bottles?

A. There are nine samples.

Q. And are they endorsed as to each hole?

A. Yes, sir.

Mr. McMillan: Well, I will introduce the entire box in evidence as one exhibit, and that will be, may it please your Honor, Exhibit No. 6.

The Court: Admitted.

Mr. Cornish: May I see those?

(The gold samples were handed to Mr. Cornish.)

Mr. McMillan: They are all there, aren't they, Mr. Cornish?

Mr. Cornish: There is nine there. I take it there are nine.

The Court: Admitted.

(The box containing the nine gold samples referred to was received in evidence and marked U. S. Exhibit No. 6.) [243]

Mr. McMillan: That is all, may it please your Honor.

You may cross examine.

Cross Examination

Mr. Cornish: Q. Mr. Bishop, do you have those logs there in your hand?

A. Yes, I have a copy of them.

Q. Would you refer to your log of Hole No. 2

(Testimony of Arthur F. Bishop.)

and tell me how far into the bedrock you drilled?

A. It appears here that the bedrock was encountered at about 13 feet, and it shows here they drilled into the bedrock up to 16 feet.

Q. And what was the total depth after you drilled in the bedrock in Hole No. 3?

A. Sixteen feet two inches.

Q. In other words, that hole was drilled about eight inches into the bedrock? A. Yes, sir.

Q. And how about Hole No. 4?

A. Well, it seems that they just went into the bedrock a few inches—about three inches.

Q. That would be a total depth of 24 feet 9 inches?

A. It is 24 feet 5 inches, the calculated depth.

Q. That is the total depth of the hole?

A. 24 feet 5 inches.

Q. Am I correct, Mr. Bishop, that the depth of the gravel to bedrock, and the depth of the hole, was the same on that hole?

A. It was practically the same, yes.

Q. And what was the character of that bedrock, hard or soft?

A. It was a terrifically hard bedrock.

Q. Hard bedrock? A. Yes.

Q. Hole No. 5, what was the total depth of that hole?

A. The calculated depth, the depth they calculated the quantities on, was 20 feet, but they went into bedrock to a depth of 21 feet. That was the total depth of the hole.

(Testimony of Arthur F. Bishop.)

Q. On Hole No. 6?

A. Calculated depth was 19 feet, and they [244] bottomed at 19 feet 6 inches.

Q. And Hole No. 7, the same information.

A. The calculated depth was 16 feet, and they went to the depth of 18 feet.

Q. Nineteen? A. Eighteen.

Q. That would be about two feet into bedrock?

A. Yes, sir.

Q. And Hole No. 8, the same information.

A. Calculated depth was 21 feet, and they bottomed the hole at 21 feet 9 inches.

Q. And Hole No. 9?

A. Calculated depth was 20 feet, and the hole was bottomed at 20 feet 9 inches.

Q. May I take a look at those drill logs you had? Do you have the original?

Mr. McMillan: The Clerk has them.

Mr. Cornish: Oh, I beg your pardon.

Q. Now, in some of these holes—for instance Hole No. 2, you found bedrock at 14 feet 6 inches, is that correct?

A. Well, not according to this copy here. The bedrock was—well, they struck the bedrock apparently about 13 feet—

Q. I beg your pardon; that is Hole No. 3. You found bedrock at 15 feet 6 inches?

A. Yes, sir.

Q. And you found a trace of gold at a distance of six inches under bedrock, or six inches into bedrock, is that correct?

(Testimony of Arthur F. Bishop.)

A. Yes; there was a trace, yes.

Q. And that was a soft bedrock?

A. Well, it wasn't soft. It is considered fairly hard bedrock.

Q. I notice the notation on this log, "Black clay mixed with bedrock at 14 feet 6 inches."

A. Well, probably a slaty material under this.

Q. And on Hole No. 4 you drilled to a depth of 24 feet—or 24 feet 6 inches? A. Yes, sir.

Q. Which was it, 24 feet, or 24 feet 6 inches?

A. It shows 24—[245] on this log it shows 24 feet 3 inches.

Q. 24 feet 3 inches? A. Yes, sir.

Q. Now, on this log that has been offered in evidence, Mr. Bishop, it says——

Mr. McMillan: Admitted in evidence.

Mr. Cornish: Admitted, yes.

Q. Oh, I see—from twenty-four two to twenty-four three you hit bedrock. Now, you also found a trace of gold in the bedrock there?

A. Yes, sir.

Q. You didn't drill beyond that to determine whether the gold continued in the bedrock. Now, I notice in your log for Hole No. 4 the notation, "Water level, three feet four inches." I take it that that was three feet four inches above the bedrock? A. I don't see that on this copy.

(Mr. Cornish exhibited the document to the witness.)

The Witness: No, that would be three feet four inches from the surface.

(Testimony of Arthur F. Bishop.)

Mr. Cornish: Q. Three feet four inches from the surface?

A. Yes, sir.

Q. Then this Hole No. 4, which is this one down here (indicating), you found went roughly 21 feet below the water level?

A. Yes, roughly; that is right.

Q. And I take it at the time you started drilling this you were at a point approximately three feet above the level of the water in the river?

A. Yes, sir.

Q. Now, on the log for Holes No. 1, 2, and 3, there is no notation as to water level. Are we to infer from that that as you drilled Holes No. 1, 2, and 3, that you didn't get below the water level?

A. Not necessarily, no.

Q. Or is that something that has just been let off that drill log? [246]

A. Evidently it is an omission there. Particularly—three was pretty close to the river, and bound to have been in that water strata.

Q. And on Hole No. 5 you have a notation, "Water level two feet," and "Depth of gravel 19 feet 6 inches." A. Yes.

Q. Hole No. 5 is this hole up here (indicating)?

A. Yes, sir.

Q. And that was the one you drilled just to the bedrock, wasn't it, or did you drill into the bedrock?

A. No; we drilled into the bedrock a foot there.

Q. And one foot from the level of 20 feet to

(Testimony of Arthur F. Bishop.)

21 feet 6 inches they took out eight milligrams of free gold? A. No; 78.

Q. No; from a distance of—from the level of 20 feet to the level of 21 feet 6 inches, or a distance of a foot and a half into the bedrock, you took out eight milligrams of free gold?

A. Of course, that was an estimate of the weight—that is just an estimate.

Q. I mean there was some free gold in the bedrock? A. Yes; apparently that is the case.

Q. And you found on several holes that you sunk that when you got into bedrock the value was continued into the bedrock, didn't you?

A. Well, they could have been carried into the bedrock by the drilling operation. That doesn't mean that the bedrock contained or carried that gold itself; it could be carried in the gravel.

Q. Would you explain, Mr. Bishop, how this value would be carried into the bedrock by the drilling operations?

A. Well, these drills, or the drill pipe is driven into the formation, and then the drills break the rock up, and to the bottom of the pipe shoe that material is pumped out, and then the procedure is repeated until it is carried down to bedrock. Now, [247] it is just possible, when you have got down to that elevation, the gold has sifted on through, and the pump didn't pick it all up in that particular operation.

Q. Then in this Test Hole No. 5 to which we are now referring you drove a pipe down into the

(Testimony of Arthur F. Bishop.)

gravel, and for a distance of 17 feet 6 inches you were driving that pipe you were working below the water level? A. Yes, that is true.

Q. Now, the customary method of recovering gold, freeing it from the substance with which it is found allied, gravel and sand and rock, is by agitation and gravity, is it not? A. Yes.

Q. In other words, the principle is that when you have a number of substances, some of which are of high specific gravity and some low, and you agitate the mass, that those with the heavy specific gravity drop to the bottom and those with the lighter specific gravity are thrown up to the top?

A. Yes.

Q. And you found that this gravel in this Hole No. 5 was for the most part loose and free-running, didn't you? A. Yes, it is.

Q. And when you drive these pipes down in there you hammer on the top of them to force them in, don't you? A. Yes.

Q. And that has a tendency, does it not, to agitate and vibrate the mass in which the pipe is being driven? A. It could.

Q. And that could also have the tendency to create the same action you get in a gold pan when you vibrate it, namely, gold being heavier would have a tendency to fall, and the gravel and the sand being lighter would have a tendency to rise?

A. Yes.

Q. Then as you drive your pipe, then, it is possible, is it not, that you drive the gold ahead of

(Testimony of Arthur F. Bishop.)

the pipe; perhaps you eventually pick it up at the bedrock, but your drill tests don't show accurately the value of gold in the top layer? All you know is [248] when you get down to the bottom you have driven a certain column and pumped out the contents?

A. That is not necessarily true, because with the suction arrangement that material is brought up with it picks up the gold and the solid—we will say to the bottom of the shoe, where it is more or less solid, and it has been the experience that these colors are picked up as they go along and determine—well, they are fairly accurate recovery all the way down——

Q. In other words, ——

A. You will note on a number of these logs that they picked up colors all the way along, and not necessarily are the heaviest on the bottom.

Q. You found in a number of cases there were values in the upper strata? A. Oh, yes.

Q. And the gold was not entirely confined to the lower strata? A. That is true.

Q. But you wouldn't say that if you drove a pipe down a foot you would get all the gold that is in that foot, or whether you would go down another foot and pick some of it in the next foot?

A. I think it has been determined over a number of years by drillers that the recoveries are pretty close, and for all practical purposes they are accepted, and the values determined for the particular

(Testimony of Arthur F. Bishop.)

elevation that they are drawn from with this suction arrangement.

Q. Now, I notice a number of figures which you have here under the heading of "Measured Core," such as, looking at Log No. 5, the figures "200, 150, 200, 200," and so on down. What do those figures represent, Mr. Bishop?

A. They represent the—well, now, this core, for instance, that is drawn out of the pipe. Now, take on No. 3, for instance. That represents the number of [249] feet and inches of this formation, or this taken-up gravel came into the pipe and was pumped out, which is—in that particular instance, is almost a perfect core.

Q. For instance, you are referring now to No. 3, are you?

A. Yes, sir, referring to that first core in No. 3.

Q. The first core in No. 3? A. Yes.

Q. The figure "320"?

A. Yes. Well, that is measured—they measure the cubical contents to check the—that is, after it is taken out and it is measured in some kind of a container, to check up the volume as against the volume in their measured core.

Q. Now then, this measured core, 320, how many cubic feet would that designate you had measured in that core?

A. In this particular instance, that isn't too clear to me. I think—well, it very definitely is not too clear to me on these particular checks of the

(Testimony of Arthur F. Bishop.)

measured core as against the core that was drawn from the pipe.

Q. In other words, you wouldn't say that that amount, that 320 cubic feet of gravel, were measured in that sample? A. Oh, no.

Q. There might be some——

A. Definitely not.

Q. I beg your pardon? A. Definitely not.

Q. Then can you tell from those logs the total cubic yardage or cubic footage of the gravel removed in the hole in making the test?

A. Oh, yes, that can be determined.

Q. All right. Does it show on the log?

A. Yes, it shows in that formula. You will notice——

Q. Well, for instance, looking at this log, Log No. 3, the one to which you refer, this formula "58 times 1 times 27 over 15.5 [250] times 27"——

A. Yes, sir.

Q. (continuing): ——"equals 37.4"?

A. Yes, sir.

Q. How do you determine from that the number of cubic feet?

A. Well, in getting an ideal section from a drill pipe, you have to calculate the area of the pipe, which in this case was the drill, the shoe, the driving shoe was seven inches in diameter, and it is through that, that seven-inch diameter in that area is driven up into the pipe as the pipe was driven down into the formation, and that area is calculated per foot in depth—that area is calcu-

(Testimony of Arthur F. Bishop.)

lated, and the values are considered at the number of milligrams, and then brought to a cubic yard basis.

Q. What I am trying to find out, if I may, Mr. Bishop, if you can tell me, is just what volume of earth or gravel was removed in making this Hole No. 3. Was it a cubic foot, three cubic feet, or a cubic yard, or how much—or can you tell from the logs?

A. No. No, there was—well, let's see——

Mr. McMillan: That is a copy you have there, Mr. Bishop; it is not the original?

The Witness: No, this is not the original.

Mr. Cornish: If there is anything on this original that you want, Mr. Bishop,——

The Witness: No, that is all right. I have the information.

Mr. McMillan: Well, I just had in mind he was writing on that sheet. He can write all he likes on that one.

A. (continuing) Roughly, there was 4.23 cubic feet of material.

Mr. Cornish: Q. 4.23?

A. Yes, sir.

Q. Now, your holes averaged roughly about 18 or 19 feet in depth, didn't they?

A. Yes; I think roughly between 17 and 18.

Q. And that would be between four and five cubic feet was removed on the average from each hole?

(Testimony of Arthur F. Bishop.)

A. Well, I imagine that is about what it averages.

Q. And out of the nine holes there would have been roughly 45—40 to 45 cubic feet of gravel, or somewhere between $1\frac{2}{3}$ to 2 cubic yards of gravel in the entire bar that was actually tested?

A. Yes, that is about it.

Q. Now, on some of these logs, Mr. Bishop, I notice you have the character of the bedrock marked and on some of them you don't. For instance, on Log No. 1 you have "Bedrock, 12 foot slate."

A. Yes.

Q. That was a slate bedrock that you found—or 12 foot slate—that was a slate bedrock that you found at the bottom of Hole No. 1?

A. Yes. As I——

Q. And that was this hole that was made up near the cabin (indicating on map)?

A. Yes.

Q. Did you, when you were up there, observe a pit or a hole behind the cabin?

A. No, sir.

Q. And if I were to tell you, Mr. Bishop, and you were to assume that the ground immediately behind the cabin—that would be approximately at the "C" in the word "Cabin"—were 21 feet in depth from surface to bedrock, and you drilled at the point which is marked on that map as "Hole No. 1," and found slate bedrock at a depth of 12 feet, would that indicate to you, Mr. Bishop, from your experience as a miner, any geological phenomena that you might want to further investigate?

(Testimony of Arthur F. Bishop.)

A. Well, it might include a channel to the south. That might be just a reef up there.

Q. It would indicate to you, would it not, Mr. Bishop, that the point where you had sunk that hole was on top of a reef, and that the values on top of that reef would be less than those that you [252] would expect to find distributed throughout the bar? A. That could possibly be.

Q. I notice, Mr. Bishop, that that one hole which you sunk to a depth of 12 feet 6 inches, showed a valuation or a value of six cents per cubic yard, and was the lowest of all the holes that you sunk.

A. That is right.

Q. And you took that hole, Mr. Bishop, to be characteristic or indicative of the values you found throughout that bar?

A. I should say it should be used in the averaging.

Q. It should be used as an average, but not at indicative of the values throughout?

A. No, I don't think so.

Q. Now, this Hole No. 2 you sunk to a depth of 12—to 13 feet, is that correct?

A. Yes, 13 feet is the calculated depth.

Q. You hit bedrock? A. Yes.

Q. And Hole No. 3, to a depth of 16 feet 6 inches? A. Yes, sir.

Q. Then you found, as you get out to Hole No. 4, that went considerably deeper?

A. Yes, sir.

Q. Now, did you notice any conditions of stream,

(Testimony of Arthur F. Bishop.)

any pool or any deeper portion of the stream at or near Hole No. 4?

A. No, I didn't; I didn't.

Q. Do you recall that out in the river between Holes No. 3 and 4 on the far side there was a big rock projecting up out of the middle of the river?

A. No, I didn't notice that.

Q. You didn't notice that?

A. I didn't notice that.

Q. If I were to tell you, Mr. Bishop, and you were to assume, that in the river immediately—just about opposite the middle of a line drawn from Hole No. 4 to Hole No. 5 there were a rock, and that was the east portion of the middle fork of the American River, would that indicate to you as a miner that you might expect [253] to find more or less values in the vicinity of Holes No. 4 and 5 than you would expect to find in the balance of the bar? A. Not necessarily.

Q. You know it to be a fact, do you not, that the deposits of gold in a placer of this sort are sometimes greatly increased by the presence of reefs, or what they call pot holes, distributed throughout the bedrock?

A. There is occasionally deposits where they are not scoured out that could decrease or increase——

Q. And it is customary to find in these placers, when you get to a hole, that if there is a reef crossed in the placer, that there is more gold on

(Testimony of Arthur F. Bishop.)

the downstream side of the reef than on the upstream side, is that correct?

A. I have seen that condition exist, and also I have found where we didn't have that condition.

Q. And you also find, do you not, that the evenner the bedrock the less deposit you find, and the more uneven the bedrock the more you are inclined to find deposited on the bedrock?

A. That is true, yes.

Q. Now, did you make any examination on this property to determine the presence or absence of reefs, or indications of reefs, or pot holes in the bedrock beneath that gravel? A. No; no.

Q. And in selecting your sites for these test holes what formed the basis of your determination that you would drill in the particular site that you did?

A. Well, it was just a general—just a general setup there to try to arrive at the location so we could get right at some reasonable estimate of volume and values.

Q. I notice you made no borings in that island that you found there (indicating on map).

A. No, we didn't bore on that island.

Q. You didn't bore on that island?

A. No.

Q. And you made no borings of the gravel in the bed of the stream? [254]

A. No; just to the edge of the stream, as shown on the map.

Q. But you found, though, for the most part,

(Testimony of Arthur F. Bishop.)

that the bed of the stream was a gravel deposit; the water was flowing over gravel?

A. Yes, the water was flowing over gravel, the flow of water.

Q. But you made no test to determine what value that gravel might have?

A. No, not in the middle of the stream.

Q. And your test holes, with the exception of Test Hole No. 9, were all made either from the hill side or the stream side of the bar?

A. Well, seven—let's see; Hole No. 7 was about halfway between, if you will notice (indicating on map).

Q. Hole No. 7, I notice right down here (indicating on map). That is about halfway between this little high water——

A. Channel.

Q. (Continuing): ——channel, and the hill.

A. That is right.

Q. The main channel of the river runs to the north,—doesn't run across what is shown there as an island, which makes that island—that is correct, is it not?

A. Yes.

Q. And Hole No. 7 you found went a depth of 16 feet?

A. Yes, sir.

Q. Then Hole No. 8 you found to be considerably deeper by about five feet than Hole No. 7?

A. Yes, sir.

Q. And you found Hole No. 9 to be a depth of 20 feet?

A. Yes, that is right.

Q. Then from your examination of the gravels, the depth at Hole No. 8 being 21 feet, and the depth

(Testimony of Arthur F. Bishop.)

of Hole No. 9 being 20 feet, and assuming that this hole in the back of the cabin were 21 feet, would you not say, Mr. Bishop, that this hole that you sunk, Hole No. 1, was sunk on the top of a reef?

A. It is possible; it is possible.

Q. And the stream action going over the top of the reef would have [255] a tendency to deposit very little, if any, gold right on the top of the reef?

A. Well, you ordinarily don't find it there.

Q. It would be either behind the reef or in front of the reef, but not on the top?

A. That is ordinarily true, yes.

Q. Now, did you notice a large pile of rock out in the middle of that bar near the location of your Hole No. 9?

A. Well, I noticed a large pile of rock which is evidently the result of some mining, and having been thrown out and wasted.

Q. What was the position of your Test Hole No. 9 with reference to that pile of rock?

A. I can't tell you that.

Q. You couldn't say whether it was within a few feet of it, or a hundred feet away?

A. No, sir.

Q. Now, Mr. Bishop, you testified yesterday that you considered the value, the market value of this property, bearing in mind the gold that you found from the tests present, that the market value of this property was, you say, twelve thousand to thirteen thousand dollars?

A. Yes, sir.

(Testimony of Arthur F. Bishop.)

Q. And I take it that you, as a miner, if you wanted property to dredge or to work as a mine, would be willing to pay that amount for it?

A. Yes, that was my idea of it.

Q. And in your opinion, Mr. Bishop, that property is of no value for anything but mining, is it?

A. That is my opinion.

Q. As a cabin site, as a farm, as a ranch, as a place for pasturing cattle, it would have practically no value? A. No, sir.

Q. Now, what, in your opinion, Mr. Bishop, would be the reasonable value, the fair market value of the privilege of going onto this property without any interference from anyone, for a period of one year and eleven months, and remove gravel or any other minerals that might be found on the property during that period?

A. Would you repeat that question for me, please? [256]

Mr. Cornish: Read the question, please.

The Court: The reporter will read the question.

(Question read by the reporter.)

A. Well, if I would be going on the property I would be going on there with the idea of mining, and on account of the high speculative hazard there I wouldn't give any more than that.

Mr. Cornish: Q. I beg your pardon?

A. I wouldn't give any more than that amount of money.

Q. In your judgment the property could be

(Testimony of Arthur F. Bishop.)

completely mined in a year and eleven months, couldn't it? A. Yes.

Q. And from what you found from your test, be mined at a profit?

A. I believe so. That is my opinion.

Q. And from your knowledge of the middle fork of the American River, the gravels on this property are considerably higher in gold content than the gravels on the stream below—or don't you know that?

A. You mean the position of this property as regards the American River, or——

Q. The gravels on this particular bar have a higher gold content than the gravels on the middle fork of the American River to the south and southwest of this property?

A. Well, I don't know about that. I couldn't answer that.

Q. You don't know about that?

A. No, I couldn't answer that question.

Q. But you would feel that from twelve to thirteen thousand dollars would be a fair price to pay for the privilege of taking gravel, or any other minerals, off this property for a period of one year and eleven months?

A. That is my opinion.

Q. And in your opinion the mining of this property, the taking of the minerals from this property, is the highest and best value or use to which the property could be put? A. Yes, sir. [257]

(Testimony of Arthur F. Bishop.)

Q. Now, are you at all familiar with the recovery of gravel for use in concrete aggregates?

A. We have recovered some, but not to any great extent.

Q. It is more expensive, is it not, to operate a stationary plant on a mining project of this sort, than to operate a moving or floating plant?

A. Yes, sir.

Q. You wouldn't undertake to operate this in any way except with a floating plant, would you?

A. No, sir.

Q. Now then, Mr. Bishop, would you be able to express an opinion as to the value to the owner of that property, of having a hundred thousand yards of that gravel excavated from the bar, elevated to a height sufficient to run it through appropriate gold recovery devices, furnishing the water and the power necessary to operate those gold recovery devices, and carrying away the tailings? Could you put a value on that?

A. No, sir.

Q. What in your judgment, exclusive of the actual physical recovery of the gold, what in your judgment would it cost per cubic yard of dirt moved to mine that with a stationary plant? In other words, to do the excavating, to do the lifting, to furnish the water, to furnish the power, and to carry away the tailings, exclusive of the actual cost of the gold recovery devices themselves?

A. I wouldn't venture an opinion on that, not

(Testimony of Arthur F. Bishop.)

knowing the cost of the different items that enter into it.

Q. As a matter of fact, you wouldn't mine it in that way, would you? A. No, sir.

The Court: The Court will take a ten-minute recess.

(Recess.)

Mr. Cornish: Q. Mr. Bishop, in your test you made I take it you found no coarse gold or other than those samples that you [258] submitted?

A. That is the only gold we recovered.

Q. I will show you Defendants' Exhibit No. C and call your attention to a large particle of gold in there and ask you whether you found any gold of the character of that piece?

A. As I recall, we didn't recover anything of that size or character.

Q. And I also call your attention to Defendants' Exhibit H and ask you if you found any gold in your test of the character and size of that piece which I have just shown you? A. No, sir.

Q. Now, from your experience as a miner, Mr. Bishop, would you expect to find particles of gold of the size and character of these two I have just shown you in a formation of river gravel more or less to the one you observed on this property?

A. Yes; we have recovered quite a few nuggets.

Q. Now, will you describe, Mr. Bishop, the process which you used in cleaning out these various samples as you went down? You say you drove the

(Testimony of Arthur F. Bishop.)

pipe down first; then what was your process of lifting the material up?

A. The process that was used is what they call—well, it is a suction arrangement. This drill arrangement has a mechanical means of raising this bailer, they call it, which has a sort of valve arrangement in the bottom, raising it quickly, and it sucks the material up into the pipe.

Q. In other words, you use a suction pipe?

A. That is about—you could term it that, yes.

Q. And in your opinion a suction pump will raise all the gold values that are in the ground, would it?

A. To the best of my knowledge it does.

Q. And you wouldn't condemn a dredger that operates on a suction principle, would you?

A. I have never seen one that operates successfully. [259]

Q. What is the difference between the suction dredge and the suction process that you used in lifting this material out of the pipe?

A. You see, this pipe is confined to a very small area; you can control it to the extreme. Whereas with the suction dredge you are working around promiscuously under water, and you don't know whether you are recovering the total area or not.

Q. Well, do you know when you pump out this pipe that you are pumping anything else besides the contents of that pipe?

A. No, not ordinarily, you don't.

(Testimony of Arthur F. Bishop.)

Q. In other words, if you were in a sand, you might pump sand from underneath the pipe?

A. Occasionally that is done, and they have to make provision in the calculations to take care of such a condition as that.

Q. But fundamentally, both the suction dredge and the process used for the removal of this core, are both suction processes?

A. They are both suction processes, yes.

Q. And do you know the pounds per square inch of suction in the process that you use?

A. No.

Q. It is the vacuum process, isn't it?

A. That is what it amounts to.

Q. In other words, it wouldn't exceed 15 pounds per square inch, would it?

A. Well now, I wouldn't venture to state in that regard.

Q. Well, the highest pressure you can get in a vacuum is 15 pounds per square inch of suction, isn't it?

A. Well, that I don't know.

Mr. Cornish: No further cross examination, your Honor.

Redirect Examination

Mr. McMillan: Q. Mr. Bishop, you heard Mr. Wiltsee's testimony in this case with reference to the manner of his having [260] drilled the test holes on the property here under consideration?

A. Yes, sir.

(Testimony of Arthur F. Bishop.)

Q. The manner in which he did it. Were the test holes drilled here in a similar manner?

A. Yes, sir.

Q. You adopted precisely the same method?

A. Yes, sir. That is the accepted method of prospecting.

Mr. McMillan: That is all.

Recross Examination

Mr. Cornish: Q. One question: Mr. Bishop, did you compute the average value per cubic yard that your tests indicate? A. Yes, sir.

Q. What was that?

A. I arrived at 34.1 per cubic yard.

Mr. Cornish: 34.1. That is all.

(Witness excused.)

Mr. McMillan: Call Mr. Smith.

RICHARD G. SMITH,

Called for the Government; sworn.

Direct Examination

Mr. McMillan: Q. Your name is Mr. Richard G. Smith? A. Yes, sir.

Q. Now, Mr. Smith, what is your occupation?

A. Mining. My present position is the manager of the Natomas Company, gold dredging department.

(Testimony of Richard G. Smith.)

Q. That is one of the larger companies in Northern California engaged in gold dredging?

A. That is right.

Q. And where is its principal office?

A. Our main operating office is in Natomas, just outside of Folsom; the main office of the company is located here in Sacramento.

Q. You have several dredging plants, have you?

A. We have. [261]

Q. How long have you been the manager of the company?

Mr. Cornish: I will state, Mr. McMillan, as to this man's qualifications in gold dredging—

Mr. McMillan: Well, I would like to qualify him generally, for the information of the Court.

Q. You are also a mining engineer, are you not? A. Yes, sir.

Q. And just state for our information how much experience you have had in mining and dredging.

A. Since graduation from Stanford in 1909 I have been engaged exclusively in placer mining. I have been with the Natomas Company since 1912, during which time I have been in charge of all their prospecting and their engineering, up to the present position, which I hold, as manager of the gold dredging department.

Q. You are acquainted with Mr. Giddings and Mr. Dorian and Mr. Bishop? A. Yes, sir.

Q. And, in fact, you had something to do with the making of those tests yourself, did you not?

(Testimony of Richard G. Smith.)

A. To the extent that that crew that put down those holes was a crew that had been working for us.

Q. For the Natomas Company?

A. For the Natomas Company.

Q. Yes.

A. And that the equipment was actually the property of the Natomas Company.

Q. Mr. Smith, your company has dredged a great number of, in this vicinity, have they not, gravel bars? A. Yes.

Q. In on the middle fork of the American?

A. No, sir.

Q. In that vicinity? A. No, sir.

Q. Tell me some of the bars that you have dredged.

A. The only bars that the Natomas Company have dredged have been located right out here out of Folsom under this management. We have also dredged—I will limit that—make an explanation, [262] rather, of that: The Natomas Company is also dredging in Oroville; they have three dredgers up there that are more or less operating in so-called bars along the Feather River. Their principal operations, of course, have been right up here near Folsom.

They have also been interested in operations on the Merced River in California.

Q. Well, you are familiar also, too, with the dredging operations of other companies up in the Northern California area? A. That is right.

(Testimony of Richard G. Smith.)

Q. The dredging operations of such companies as—you could name a few of them?

A. Well, I could probably name all of them with a little thought. Our connections have also been, as I said, on the Merced—the San Joaquin Mining Company, the Merced Dredging Company, are subsidiaries of the Natomas Company; the Yuba Manufacturing Company of the Yuba Consolidated Goldfields we have been more or less in close touch with. Our operations have been the same, to the same extent. The personnel have changed from time to time when management has been from one company to another.

Q. And you are familiar with the properties that they have dredged? A. That is right.

Q. Throughout Northern California. Are you familiar with the property here under consideration, the 40.34 acres of land?

A. From superficial examination only.

Q. You did make an examination of that property?

A. I saw the property and was there, that is all.

Q. And you are familiar with properties in that vicinity, are you? A. Yes.

Q. And up and down the bar. Did you make an examination of that property for the purpose of forming an opinion of the market value [263] of it? A. Yes, sir.

Q. You are familiar with the prices paid for dredging property around California?

A. Yes, sir.

(Testimony of Richard G. Smith.)

Q. Your company has purchased properties, or handled properties on a royalty basis, have they not? A. Both ways.

Q. Many of them?

A. Quite a number of them.

Q. And you are familiar with those?

A. Yes, sir.

Q. And you have been in the courtroom all the while this case has been going on, and you heard the testimony that Mr. Wiltsee gave with reference to the tests made upon that property?

A. Yes, sir.

Q. And you are also familiar with the test that the Government made upon that property?

A. I am.

Q. The testimony has been introduced here. You heard the testimony of Mr. Wiltsee with reference to the proper method of recovering the gold up there, as to dredging. Do you approve of the method that he testified to?

A. I do, absolutely.

Q. And in your opinion would it require a dredger of the capacity to which he testified to dredge that property?

A. I believe that would be the most efficient size as far as that property is concerned.

Q. Well, in going over that property, and by reason of your experience and investigations in dredging matters, could you tell us whether or not that property is easily accessible, and whether it affords very easy facilities for being dredged

(Testimony of Richard G. Smith.)

feasibly and economically—or, on the other hand, are there any drawbacks that might require greater cost?

Mr. Cornish: Objected to, if the Court please, on the ground it is compound and complex and indefinite. As to the witness testifying what the cost would be I have no objection, but I [264] think——

Mr. McMillan: I withdraw the entire question.

Q. By reason of your experience and familiarity with dredging and the operation of dredgers please state whether or not the property here under question could be dredged with the easiest facility.

Mr. Cornish: To which we object again, if the Court please, on the ground that the question contains a relative term—"with the easiest facility."

Mr. McMillan: Strike out the word "easiest."

Mr. Cornish: And the same objection to the word "facility"; it is a relative——

Mr. McMillan: Withdraw the question.

Mr. Cornish: It is a comparative expression, Mr. McMillan.

Mr. McMillan: Withdraw the question.

Q. Will you please state in your own way, Mr. Smith, the condition of that property as you observed the property and from your experience as to dredging?

A. The property is not the easiest dredging property that has been in the State of California. I think that is readily—would be readily acknowledged by anyone conversant with dredging. The

(Testimony of Richard G. Smith.)

problems that arise on that do not arise in the districts that the Natomas Company are dredging in around Folsom. There are many problems presented in a river channel that we don't possibly experience in open field work such as in the fields of Folsom. For that reason there are conditions that must be considered in connection with the operation of that property and placing a value on that property.

Q. What are some of those problems and considerations?

A. Well, the problems have been, as outlined by Mr. Wiltsee, to the extent that the dredge that must be put on there is more adapted to a dragline operation than it is to a bucket line [265] operation. The dragline operation is more expensive to operate than a bucket line operation. The other conditions that exist are, on account of the confined channel to which that river is limited, it is necessary, and will be necessary at certain times of the year, to keep your dredge protected from flood conditions. There is another condition there that causes trouble from dredging operations. Whenever there is stream pollution in the State of California it must be taken into consideration. It is almost impossible to dredge in the streams of California at the present time without polluting a river which goes into a navigable river, the Sacramento River, and for that reason conditions must be taken care of——

Q. As to its accessibility?

(Testimony of Richard G. Smith.)

Mr. Cornish: I will stipulate, Mr. McMillan, the Court can form its own opinion as to whether the property is accessible.

Mr. McMillan: Q. I am speaking from the dredger man's standpoint.

A. Obstacles, as far as accessibility, are not insurmountable. It will cost more money. Dredgers have been taken to such places as New Guinea, where they have had to be flown in with planes. So I wouldn't say that there is an insurmountable obstacle.

Q. Do you agree with Mr. Wiltsee's opinion that the dredging outfit should be of the size he testified to, to go in there?

A. I believe that would be the most efficient.

Q. Do you agree with him on the cost of such equipment? A. I do.

Q. That was about \$140,000, wasn't it?

A. Yes, sir.

Q. Now, Mr. Smith, by reason of your experience and investigation and familiarity to which you have testified as to mining properties, and by reason of your having seen this property, familiarity [266] with the tests which have been made, and having heard all the testimony in that regard in court, and keeping in mind the enhanced value of that property by reason of its having gold bearing gravel, and taking, if you please, the cubic yardage given by Mr. Wiltsee, 600,000 cubic yards, have you formed an opinion as to the market value of that property as of October 10, 1939? Before

(Testimony of Richard G. Smith.)

answering that question I would like to ask you one or two more preliminary questions.

Mr. Cornish: May it be stipulated, Mr. McMillan, that our objection that we made before to this line of testimony, stands.

Mr. McMillan: Yes.

Mr. Cornish: And similarly ruled upon the Court?

Mr. McMillan: Yes.

Q. Mr. Smith, to what uses could that property up there be put at present or in the reasonably near future—what uses is the property capable of being put to?

A. Well, the principal use that I would say that property could afford to anyone would be for mining purposes.

Q. It is not good for grazing, or a summer resort, or fishing, or hunting, or any other use but mining?

A. Well, the value for that purpose, I would say, would be very small.

Q. The highest and most profitable use to which the property could be put would be for mining?

A. That is my opinion.

Q. Now then, have you formed an opinion as to the market value of that property, taking into consideration all its uses, and the most profitable use to which it could be put?

A. I have.

Q. And taking into consideration the enhanced value that I spoke of a moment ago?

A. I have.

(Testimony of Richard G. Smith.)

Q. Now tell us, please, what, in your opinion, was the fair market [267] value of this subject property—that is, the 40.34 acres of land—on October 10, 1939, the date when the summons issued in this action?

A. It is my opinion the fair market price for that property would be \$12,000.

Q. You understand in arriving at that opinion that market value is the highest price estimated in terms of money which the land will bring if exposed for sale in the open market, with a reasonable time allowed to find a purchaser buying with knowledge of all the uses and purposes to which it is best adapted, and to which it is capable of being used? You understand that? A. Yes.

Q. You have taken that into consideration?

A. Yes, sir.

Q. I assume that a man in a dredging business like yourself, that if you had an easement on there for two years, with the right of taking the gravel and everything off of there, that you could take it all out, could you not? A. That is right.

Q. You would therefore take out the full value?

A. That is right.

Q. But supposing that on that property an easement for two years was given, with a right to use the property and to take gravel and sand, and the gravel would be ore-bearing, and not a thing was taken off the property by the person who had the easement—nothing whatever was taken out; he was simply in the occupation and possession of

(Testimony of Richard G. Smith.)

that property for one year and eleven months—what would you say was the fair market value of the use and occupation of that property during that period?

A. It would be my opinion that the fair interest rate on that valuation would be just compensation.

Q. Well, in your opinion, what have you in mind by a fair and reasonable rate of interest—seven percent? You are figuring on the investment value. What would you say was a reasonable rate [268] of interest?

A. I don't believe I am capable of answering that.

Q. I see. But by a reasonable rate you mean as obtains in the business world, from four, five, six, to seven percent?

A. That is my impression, yes.

Mr. McMillan: Yes. That is all.

Take the witness.

Cross Examination

Mr. Cornish: Q. Mr. Smith, I take it from your answer that if you owned this property and the Government took possession of it for a year and eleven months and excluded you from mining the property, that you would be satisfied to take interest at some rate on \$12,000, and feel that you had been adequately compensated?

A. That is right.

Q. And I take it also from your testimony that

(Testimony of Richard G. Smith.)

you would be perfectly willing to buy this property for \$12,000? A. That is right.

Q. Now, have you operated, in the course of your experience, any stationary gold recovery plants? A. No.

Q. As a matter of fact, you wouldn't mine this property with a stationary gold recovery plant, would you? A. No, sir.

Q. And you wouldn't be particularly interested in any plans if you were the owner of it that required you to recover the gold from that property with a stationary gold recovery plant, would you?

A. I would say that question is too broad for me to answer.

Q. Well, let me put it this way: In your judgment, Mr. Smith, what would it cost to excavate 100,000 yards of that bar, hoist it up to a height sufficient to run it through gold recovery devices by force of gravity, to furnish the water and furnish the [269] power, and take away the tailings?

A. I wouldn't definitely state a fixed price, but I would say it would exceed 10 cents a yard.

Q. It would exceed 10 cents a yard?

A. That is right.

Q. Now, Mr. Smith, from your examination of the gravels there, and from what you have seen of these tests, in your opinion, if the Government, if someone excavated 100,000 yards of that gravel, placed it at a height sufficient to run it by force of gravity through gold recovery devices, furnished the water and furnished the power and carried

(Testimony of Richard G. Smith.)

away the tailings, so that the only expense was the expense of operation, exclusive of water and power, of your gold recovery devices, what return would you expect to receive from the recovery of the gold in this 100,000 cubic yards?

A. You mean—by that do I gather you are asking what my opinion is of the value per yard of that gravel, that 100,000 yards?

Q. Well, let me withdraw the question. The tests indicated, Mr. Smith, to your knowledge, that this gravel averaged about 34 cents per cubic yard?

A. What gravel?

Q. The gravels in the bar, averaged throughout.

A. The gravel as a whole, yes.

Q. Yes. A hundred thousand yards of the average gravels put through concentrating devices, in your judgment, would net a recovery of about \$34,000?

A. That is right.

Q. If the power and water and the excavating and elevating and carrying away the tailings were furnished by someone, and you didn't have to pay for them, and an average run of the bar were taken, you would expect a net recovery from that hundred thousand yards of \$34,000?

A. With no expense your net would be thirty-four thousand.

Q. Now, you say you are familiar with the operation of the various [270] gold dredging companies?

A. Yes, sir.

Q. And you are quite familiar with the operations of the Yuba Consolidated?

(Testimony of Richard G. Smith.)

A. What do you mean by "quite familiar"?

Q. Well, do you know the type of work they are doing?

A. Yes, sir.

Q. Do you know anything of a recent purchase of any patented dredging equipment by the Yuba Consolidated?

A. No, sir, I wouldn't know that.

Q. You don't know whether, then, they have or have not recently purchased any patented gold dredging equipment that might or might not be an improvement over present methods?

A. No.

Q. Now, in your judgment, Mr. Smith, if you owned this property, and someone came to you and said that they wanted the exclusive right, independent of any interference from you, to remove gravel from this bar for a period of one year and eleven months, and to take such other minerals as they might see fit, what in your opinion would be a fair compensation to pay to you as the owner of that property for that right, given on the 10th of October, 1939, and to extend for a period of one year and eleven months thereafter?

A. \$12,000.

Q. In other words, you feel that in that time that they could take out everything that was in the property?

A. That is right.

Q. Now, you are familiar, are you, with any suction dredges that have been put on the market?

A. No, sir.

Q. Your operations have all been by bucket line dredges, haven't they?

A. That is right.

(Testimony of Richard G. Smith.)

Q. Your company doesn't even operate the dragline—— A. We have one.

Q. You have not operated any?

A. We own one, but have not any in operation. [271]

Q. But you have never operated a dragline equipment in gravel similar to this? A. No.

Q. From your experience with such equipment you don't know what would be the cost of operation for dredging per yard with that kind of equipment?

A. I am familiar with dredging operations.

Q. Those dragline equipment operations vary all the way from five cents to twelve cents, and sometimes higher, per yard?

A. That is right.

Q. Depending upon the problems that confront the particular equipment. Now, in your judgment, equipment suitable to operate this property would cost, you say, a hundred forty thousand dollars?

A. That was the figure Mr. Wiltsee gave, and I think it is very close to that size of equipment.

Q. All right. How long would that equipment last?

A. That depends a good deal on the operator.

Q. Assuming it was carefully taken care of.

A. The shovel equipment itself is generally depreciated over a period of four or five years.

Q. Four or five years. And what about the concentrator.

(Testimony of Richard G. Smith.)

A. Well, the washing plant itself is possibly good for 50 percent longer time than that.

Q. That would be somewhere around six to seven years? A. That is right.

Q. How long, in your opinion, would it require to mine this property with the equipment of the type we are now discussing?

A. Oh, possibly five months.

Q. Five months. Then the equipment would not be, by any means, worn out in mining this bar?

A. That is right.

Q. And while the equipment would cost \$140,000 if purchased new, [272] it would have considerable salvage value when the operations were completed, would it not?

A. There is a lot of them in California.

Q. There is a lot of them for which there is no sale at all? A. No sale.

Q. Well, that situation is brought about by the inability of operators to mine gold, isn't it?

A. That is one reason.

Q. And I presume that similar equipment could be purchased second-hand at a figure a good deal less than \$140,000?

A. I wouldn't doubt that at all.

Q. What, in your opinion, would be the fair market value of equipment of that sort after it had been operated for six months, say?

A. That is entirely beyond answering without seeing the equipment.

Q. Assuming equipment that has been carefully handled, or handled in such manner that the shovel

(Testimony of Richard G. Smith.)

would wear out in four to five years, and the washing plant in six to seven and a half years. In other words, approximately one-eighth to one-tenth of the use of the shovel expired, and one-twelfth to one-fifteenth of the use of the washing plant.

A. I wouldn't put a price on that, Mr. Cornish.

Q. As a matter of fact, that equipment, or equipment of the type we are discussing, could be purchased—equipment suitable for mining this property could be purchased for a good deal less than \$140,000?

A. I don't doubt that.

Q. And you don't know for how little?

A. No, sir.

Q. You don't know of any suction process, in your experience, that recovers all the gold, do you?

A. No, sir.

Q. No matter what sort of suction method you use, a certain amount is not picked up by suction?

A. When you talk about [273] suction process, probably you aren't confining your statement to the extent I could answer that.

Q. Well, is it possible to raise coarse gold by suction?

A. A certain distance.

Q. How far?

A. I wouldn't state how far.

Q. Could you raise it 10 to 15 feet?

A. No, I don't think so.

Mr. Cornish: That is all.

Mr. McMillan: That is all.

(Testimony of Richard G. Smith.)

And the Government rests, may it please your Honor.

(Witness excused.)

(Government rests.)

Mr. Cornish: May it please your Honor, with respect to rebuttal to be offered by the defendants—I hadn't expected the Government to rest so soon, and I doubt if I could produce any rebuttal witnesses by two o'clock this afternoon, and I hesitate to impose upon the Court for an adjournment until Monday, but I think we can, by reviewing the evidence this noon, ascertain what, if any, rebuttal we do want, and it may be by two o'clock we will decide we will not put any on. So would it be an imposition on your Honor to ask that the matter be adjourned until two o'clock, and we, at that time, notify the Court as to whether we will desire any rebuttal? I realize, your Honor, I should be ready, but seeing the raft of Government witnesses here in the courtroom, I assumed there would be——

Mr. McMillan: You mean an array, Mr. Cornish, not a raft.

Mr. Cornish: Well, we will call them an array.

The Court: Two o'clock?

Mr. Cornish: Yes.

The Court: Such will be the order.

(Whereupon a recess was taken until 2:00 o'clock p. m.) [274]

Friday, November 19, 1943

2:00 o'clock p. m.

Mr. Cornish: May it please your Honor, in reviewing the testimony during the noon hour, I recall that the United States Engineer who identified this map which is on the board, the Plaintiff's Exhibit No. 3, testified—whether he did so inadvertently or not—that the north and south boundaries as shown on that diagram were not necessarily accurate; that the south boundary might be moved further south, and that the north boundary might be moved further south.

Your Honor has in evidence the survey of the property made by Mr. Wiltsee, or under his direction, and Mr. Wiltsee's survey corresponds more with our theory that the boundaries of this property should be moved further to the south.

In other words, as Mr. Wiltsee's survey shows, the north line of the property would run about as I am indicating with the pencil (indicating on map), possibly three to four hundred feet further south than is shown on this diagram, and similarly the south boundary of the property would run three to four hundred feet further south than the south boundary as shown on this diagram.

It makes this difference, your Honor: It increases the area of that portion of the bar which is on the south side of the middle fork of the American River. Three of Mr. Wiltsee's test holes were sunk in locations which, according to the diagram which is on the board, would not even be on

the property as shown on the United States Engineers' map.

The testimony we would offer by way of rebuttal is to call as a witness Mr. Allen H. Millborn, who made the survey of this property in 1934 which I have before me, which has not yet been [275] offered in evidence because not identified, a diagram showing the north and south boundaries and the dimensions and directions of each, and according to this diagram the boundary line runs more in accordance with Mr. Wiltsee's survey than it does with the United States Engineers' survey.

The practical effect of that, your Honor, is to increase the volume of gravel in the 40 acres by somewhere between 75,000 and 100,000 cubic yards, which would account for the difference in volume as computed by Mr. Wiltsee and as computed by the United States Engineers. The figure of the United States Engineers is 527,000 cubic yards of dredgable gravel on the property, and Mr. Wiltsee's figures are 600,000 cubic yards of dredgable gravel on the property.

Mr. McMillan, in his questions concerning the value of the property has proceeded upon the theory, or has framed his questions predicated upon a gravel volume of 600,000 cubic yards.

Your Honor will recall we objected to that testimony; that we took the position that in a case of this sort, that where the Government condemns the mineral rights in the property as distinguished from the property itself, that the test of value is not the market value of the property, but is the

value of the minerals within the property, which minerals the Government, by this condemnation proceeding, has the power to take if it sees fit to take them.

Consequently, to corroborate Mr. Wiltsee's testimony, we would like to, if your Honor would grant a continuance for that purpose, produce the surveyor,—or if the United States is willing, that we offer in evidence this survey made by Mr. Millborn, with the stipulation that if called Mr. Millborn would establish that he was an experienced surveyor,—that is, he [276] would have the minimum qualifications necessary in order to qualify him to testify to a survey—and that if called he would establish the boundaries to be shown as in this diagram.

Now, we feel that is material, because we are going to ask the Court for permission to submit written authorities on the question of the measure of damages in this case, and we would like to corroborate as strongly as possible our theory of the value of the gravel, our contention being that the test of the measure of damages is based upon the mineral resources which could have been withdrawn from that total amount of gravel had the Government not interfered and retained possession of the property.

Now, either I would like to call Mr. Millborn, or if the Government would stipulate that Mr. Millborn, if called, would identify the boundaries on this diagram.

I would like to offer the diagram, your Honor, and then rest.

Mr. McMillan: May it please your Honor, we will neither stipulate nor consent to a continuance for that purpose. That was part of counsel's case in chief, to establish his area. It isn't proper rebuttal. He put his witness on, Mr. Wiltsee, and based on his survey thereof, 600,000 cubic yards—your Honor will recall we disregarded the survey made by the Government, 527,000 cubic yards, and my questions to my witnesses in fixing value and in forming their opinion was based upon that testimony, the testimony of Mr. Wiltsee, on the area of 600,000 cubic yards.

Now, it would be an awkward situation to grant a continuance as counsel suggests, and get testimony that would put awry all the questions we asked the witnesses as to the market value.

To refresh your Honor's recollection, every witness in that regard, we took not our figures; we took the figures of defense [277] counsel in this matter, and his survey, which was introduced under the testimony of his witness, Mr. Wiltsee, and we based our questions upon 600,000 cubic yards, and not 500,000 cubic yards, as shown by our survey.

We object to the introduction of this; we will not stipulate to it and we will not consent to a continuance of the case for that purpose; that at most it is to corroborate a witness, as counsel has stated, who has already testified for the defense. It is a part of the case in chief, to start in with, and it is not in rebuttal.

Mr. Cornish: May it please your Honor, the interesting feature of this survey by Mr. Millborn is that so far as the south boundary of the property is concerned—the survey submitted by the United States Engineers, as far as the southwest corner of the property is concerned, and as far as the direction and the distance—the length of the southern boundary is concerned—checks almost within a foot and a half of each other. The direction is substantially the same, and the boundary—the corners are substantially the same, the main difference being that the Government, by its survey, tilts the property slightly to the west at an angle of about two degrees from the directions as shown by Mr. Millborn's survey, but the main difference in the survey lies in the position of the river as shown on that diagram.

Now, your Honor will recall that the plaintiffs offered in evidence in their preliminary case a diagram which shows the middle fork of the river coming—this dimension at the top is 643 feet, as their survey shows, approximately 300 feet from the northeast corner, and the second map they have shows that this dimension is 140 feet; shows the river coming approximately 600 [278] to 650 feet from that corner (illustrating on maps).

Now, it is material in this, your Honor: that this survey which was introduced contrary to the diagram that was introduced in the preliminary case moves the property, the entire bar, along with that bar to the west of the river, 300 to 400 feet to the south. We feel that while it is true we were

entitled in our case in chief to submit any survey that we saw fit, that the Government, having departed from its original theory on the position of this bar, and placed it, by a survey, 300 to 400 feet south, by a witness who could not identify the boundaries, saying that the diagram was made to survey the bar, not for the purpose of showing the boundaries, that it is proper rebuttal for us to show where, in truth and in fact, those boundaries do run, with those two bars on this river.

I had never dreamed, when we put on our case in chief, that the Government would produce two surveys that were so entirely different.

Your Honor will recall when the case opened that I questioned Mr. McMillan and the witness about where the west bank was, and I called their attention to the fact that this Exhibit No. 1 showed the west bank of the river running clear over the west boundary of the property, and I informed them that it was the defendants' contention that the river was entirely in the property, coursed through and did not leave the property until near the southern end, and in my questioning it was determined that this island that is on here had been sketched by someone's estimate after looking at the property, and had not been put on by any accurate measurements being taken.

Your Honor was on the property. Your Honor will recall seeing this island (indicating). On this diagram it is almost due west of [279] the cabin, and on the property it doesn't come down anywhere near the cabin (illustrating on map).

So in the Government's case, which has established a survey from which it has departed in offering Plaintiff's Exhibit No. 3, and I feel it is proper rebuttal—it is to rebut that testimony by showing where, in truth and in fact, these boundaries do fall.

That is the only thing I have in the way of rebuttal, and it is the matter of a difference between—at least a difference between the computation of yardage made by Mr. Wiltsee and the computation of yardage testified to by the United States Engineers.

In my judgment, the testimony of the United States Engineer is not particularly credible. I don't mean to infer that the witness testified to an untruth. Perhaps he was only confused, and perhaps apologies will be made for his confusion. But he did testify positively, as your Honor will recall, that he couldn't say that the north and south boundaries were actually fixed with reference to their position on the bar; that he was concerned primarily in surveying the gravel for the test holes in respect to their position in respect to the river, and not in respect to their position in respect to the north and south boundaries.

It will only take about 15 minutes of the Court's time to establish that. The testimony will be that the boundaries are shown on this diagram, and unless the plaintiff will stipulate that the witness, if called, would substantiate that fact, I would like the privilege of calling him, for if our theory is correct that the damages are to be measured by

the gravel in the bar, it is a matter of a difference of at least 100,000 cubic yards——

Mr. McMillan: One moment. 100,000 yards between the map you just introduced by your own witness—— [280]

Mr. Cornish: There is a difference in area of approximately 75,000 yards between the map introduced by the Government and the map introduced by us, and 75,000 yards on the value fixed by the witnesses, 35 cents one witness said, and 34 cents another witness said, there is substantially \$25,000 worth of gold that would be recovered from that property, based upon the analysis of the drill tests by Mr. Wiltsee and by the United States Government.

Now, if this measure of damages—if it is predicated—we are not contending that we are entitled to the gold value of the property. As I stated to your Honor in the opening statement, we contend that since the primary, highest and best use to which this property could be put is mining property, that we are entitled to a measure of damages based upon mining property; that since the uncontroverted testimony shows that the defendants were prepared to mine it, had even taken an option on dredging equipment, for which they agreed to pay \$28,000, which they abandoned because the Government contemplated the condemnation of the property and they didn't want to invest that money in machinery and be held up by condemnation proceedings, they proceeded in good faith, and they abandoned the project, the damages should be based

upon the interest during the time they were delayed in enjoying the property upon the net profit it is reasonable to believe they would have derived, and all the witnesses testified concerning that, that within the period that the Government held them from possession they could have mined, completely mined, all the gravels in this property. In other words, had the Government stayed off, and the testimony is before your Honor, these defendants would have entered upon the property, put on the necessary machinery, mined and recovered the gold.

Now, with the war on, they are unable to get parts, and they [281] are unable even to get a permit to mine where the primary commodity which they seek to recover is free gold.

It is our contention that under those circumstances they are damaged to the extent of the interest on the profit that they would have derived from the use of this property as a mining property had they not been interfered with by the Government, and had the Government not taken possession and deprived them of possession.

So to that extent, and the extent of the recovery they would have derived from that additional ground, I feel the evidence is highly material, and it is rebuttal, because in introducing in evidence Plaintiff's Exhibit 3, the Government has definitely departed from the map offered in its preliminary case, where it shows that the river runs within 300 feet of the north boundary, and then introduced another exhibit which purports to show it runs 600 feet from the north boundary.

Mr. McMillan: May it please your Honor, your Honor will recall very well in reference to the map that was introduced upon the preliminary showing, I stated to the Court it was simply to inform the Court of the general location and of the nature of the project, because I expected that your Honor would be going up there to view the premises. We never used that map for any purpose except to point out for the Court's information, for illustration, about where the project was, and the general location and general nature of the project; but as to a survey of the quantity of gravel, or anything of that kind, no use was made of it.

I object further to the introduction of this testimony, may it please your Honor, on the ground it is not proper rebuttal, and it is impeachment of their own map and survey which they have [282] introduced in evidence under Mr. Wiltsee and led us to accept the 600,000 cubic yards as the basis of our putting our questions to our witnesses upon the market value of the property, and this is a late stage to come in and seek to impeach their own map and disarrange the questions which we have asked, where it was a part of their case in chief, and I accepted Mr. Wiltsee's survey as the survey they were going to follow through.

Now they are coming in with this for what? To corroborate Mr. Wiltsee's map, apparently. There doesn't seem to be any great disagreement between this map and the one they are going to show, and having used that survey to show not the meets and bounds of the property—the property is 40.34 acres

of land—that survey was introduced to show the full quantity of gravel, 8.10 acres of land.

The Court: The objection is sustained.

Is the case submitted?

Mr. Cornish: Will your Honor ask that we submit written authorities?

The Court: Yes, I was going to ask you submit it on briefs.

Mr. Cornish: Today is the 19th.

Mr. McMillan: I might state, your Honor, in case I lose sight of it, I just received a telephone call—I couldn't find the latest issue of the Federal Supplement, but I have noted the case down—I have a memorandum made of this case—Mr. Martin telephoned it to me from San Francisco—51 Federal Supplement, page 726, a condemnation proceeding brought under the Rivers & Harbors Act, I was told, in which the property sought to be condemned was timber and power and other personal property, and it was held there because it was under the Rivers & Harbors Act, not a declaration of taking, which vested title, there is no title [283] vested until the judgment was entered, and therefore they had a right to abandon it at any time before that, and there was no taking until the judgment was entered.

I just give that memorandum to your Honor now in case I should lose sight of it.

Mr. Cornish: Might the defendants, your Honor, have 15 days to submit the opening authorities?

The Court: Yes.

Mr. McMillan: 15 days, may it please your Honor?

Mr. Foley, is that satisfactory?

Mr. Foley: Yes.

Mr. Cornish: And by that time, your Honor, I can either submit the answer in 10 days, or I will be in the Army, I don't know which, but I will let your Honor know. I will either notify your Honor at the end of 30 days that I will not submit a reply, or I will submit it 10 days thereafter.

Mr. McMillan: As it stands now it is 15 and 15.

Mr. Cornish: 15, 15, and 10 if we desire.

The Court: Yes.

(Testimony Closed)

[Endorsed]: Filed Nov. 26, 1943. [284]

[Endorsed]: No. 11142. United States Circuit Court of Appeals for the Ninth Circuit. *F. M. O'Connor, Stella M. O'Connor, W. H. Morrison and R. J. Miedel, Appellants, vs. United States of America, Appellee.* Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed September 17, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11142

F. M. O'CONNOR, et al,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Statement of Points on Which Appellants Intend
to Rely on Appeal and Designation of Portions
of the Record Necessary for the Consideration
Thereof.

A. Points on Appeal

By summary order for immediate possession pursuant to U. S. Code Title 33, Section 594, the United States seized real property of the defendants. The complaint described the quantum of estate taken as (1) the right to possess the property for a two year period commencing when suit was filed, and (2) the right, during that period, to take gravel and gold therefrom for use in the construction of a proposed and authorized debris dam.

The Court erred:

1. In awarding the defendants compensation only for the possession of the property and denying compensation for the intangible profit a prendre taken.

2. In admitting evidence of market value of land in which the United States sought only temporary possession and an incorporeal profit a prendre.

3. In permitting the United States to prove it did not enjoy the incorporeal right to the extent it was defined in the complaint.

4. In permitting the United States to prove a predetermined, unexpressed intent to enjoy the incorporeal profit a prendre to the extent less than that right was defined in the complaint.

5. In rejecting proof offered by the defendants that the extent of intended enjoyment of the incorporeal profit a prendre varied even after the United States entered into possession.

6. In rejecting proof offered by the defendants of negotiations preceding filing of suit in which the United States refused to define the extent of the incorporeal profit a prendre.

B. Appellants Designate the Following Parts of the Record Necessary for the Consideration Thereof

1. The complaint.
2. The order for immediate possession of the premises in issue.
3. The answer to the complaint.
4. The declaration of abandonment.

5. The motion to dismiss after abandonment.
6. The order denying motion to dismiss following abandonment.
7. The opinion of the Court.
8. The findings of fact and judgment.
9. The notice of appeal.
10. The phonographic reporter's transcript of the evidence taken at the trial.
11. Clerk's certificate.

Dated: September 26, 1945.

FRANCIS T. CORNISH

Attorney for Appellants R. J. Miedel, W. H. Morrison, F. M. O'Connor and Stella M. O'Connor.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed September 27, 1945. Paul P. O'Brien, Clerk.

